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Supreme Court of the United States

October Term, 1969

No. 1406

NORMAN F. DACEY & NORMAN F. DACEY, doing business as NATIONAL ESTATE PLANNING COUNCIL,
Petitioners,

against

NEW YORK COUNTY LAWYERS' ASSOCIATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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April 8, 1970

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NEW YORK COUNTY LAWYERS' ASSOCIATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on December 8, 1969.

The Opinions Below

The opinion of the Court of Appeals for the Second Circuit, reprinted in the Appendix annexed hereto, is not yet reported.

The opinion of the District Court is reported at 290 F. Supp. 835. The judgment, order and opinion of the District Court are reprinted at page 28a of the petitioner's Appendix in the Court of Appeals, nine copies of which are submitted herewith pursuant to Rule 21(4) of this Court.*

Jurisdiction

The judgment of the Court of Appeals (reprinted in the Appendix annexed hereto) was entered on December 8, 1969. On March 9, 1970, by order of Mr. Justice Harlan, the time within which to file a petition for a writ of certiorari was extended to March 23, 1970. Thereafter, by order dated March 13, 1970, Mr. Justice Harlan granted a further extension of the time within which to file a petition for a writ of certiorari to April 9, 1970. Jurisdiction in this Court is invoked under 28 U.S.C. Section 1254(1).

Question Presented

Is "probable cause" as an absolute defense available against a claim for Civil Rights Act damages where a state court has granted an illegal injunction pursuant to an unconstitutional criminal contempt conviction?

Constitutional and Statutory Provisions Involved

United States Constitution, First Amendment:

> "Congress shall make no law * * * abridging the freedom of speech or of the press * * *."

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* All record references in the form of page numbers are to the Court of Appeals Appendix.

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United States Constitution, Fourteenth Amendment:

"* * * nor shall any State deprive any person of life, liberty or property, without due process of law * * *."

42 U.S.C. Sec. 1983 (Civil Rights Act of 1871):

"Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and Laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Statement of the Case

Preliminary Statement

The critical issue presented by this appeal is whether a non-integrated bar association, acting under color of state authority in an "unauthorized practice" proceeding can interfere with the First Amendment right of free speech of an accused and thereafter assert the defense of probable cause in a damage action based upon the Civil Rights Act of 1871?

In 1965, petitioner, Norman F. Dacey, who is not a member of the bar of any state published a book entitled *How to Avoid Probate!* which to date has had sales in excess of 800,000 copies. The book attacks the probate court system and the lawyers who support it. In January 1967, one and a half years after the initial publication of the book, and after the sale of 700,000 copies, the New

York County Lawyers' Association, the respondent herein, commenced a special proceeding to suppress the book and Dacey's public comments about its contents, and to punish Dacey for criminal contempt of court solely upon the ground that his authorship and publication of *How to Avoid Probate!* constituted the unlawful practice of law. Respondent proceeded summarily, without warning, by service of a notice of motion upon Dacey in Connecticut where he resides, ostensibly gaining jurisdiction by reason of the New York "long-arm" statute governing torts committed within the state.

To accomplish its objective of suppressing the book and thereby silence the criticism expressed in it and by Dacey in his public appearances, respondent accused Dacey's publisher and two of New York City's largest booksellers of the unauthorized practice of law, and joined them as parties in the summary proceeding. The proceeding accomplished the suppression of the book and the silencing of Dacey. The publisher refrained from further printing or advertising and Dacey was denied access to the mass media.

The New York County Lawyers' Association is one of the largest local bar associations in the United States. Its members are lawyers whose pecuniary interests demonstrably lie in the suppression of Dacey's book and his popularization of the intervivos trust as a means of estate planning. This action seeks to collect damages for the bar association's abuse of its apparent authority.

The District Court dismissed Dacey's complaint upon the ground that the bar association had immunity from suit and that the bar association could avail itself of the

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defense of probable cause. The Second Circuit held that the bar association should not have absolute immunity, and that it could not claim immunity in this instance, but it affirmed the judgment of the District Court upon the ground that the defense of probable cause was available to the respondent as a matter of law.

Dacey here asks that this Court grant review of the judgment below, reverse and direct respondent to answer his complaint and proceed to trial. Protection of the civil right of free speech and punishment of its transgressers requires no less.

The Facts

In January of 1967, respondent commenced a proceeding under Section 750 B of the Judiciary Law of the State of New York to punish petitioner for criminal contempt of court and for an injunction on the ground that petitioner's authorship of the book *How to Avoid Probate!* constituted the unlawful practice of law.

Respondent sought to enjoin Dacey from giving legal advice to the public at large and from representing, advising and recommending to the public by any means, whether written, oral or mechanical, in any medium that any writing, including forms, whether prepared by Dacey or others, was legally sufficient or suitable to create a legal relationship or transfer of property. Respondent further sought to restrain Dacey from introducing, advising or recommending to the public at large, the proper method of preparation, execution, witnessing or filing of legal documents or the selling of forms or other writings in such a manner as to

imply or cause the public to believe that a document was sufficent to establish or abolish a legal relationship.

Respondent joined as parties in this proceeding, petitioner Dacey's publisher and two of New York City's largest book sellers. At the time respondent commenced this proceeding, *How to Avoid Probate!* had been in general distribution for eighteen months and had sold 700,000 copies. Dacey had appeared on scores of television and radio programs and had distinguished himself as the leading exponent of probate reform.

The judgment of Special Term of the Supreme Court, New York County, entered on September 12, 1966, found Dacey guilty of criminal contempt of court and enjoined him from all of the aforementioned acts, fined him the sum of $250.00 or thirty days in jail for non-payment of said fine. The court also enjoined Dacey's publisher and book sellers from further sale of *How to Avoid Probate!* and found them guilty of criminal contempt. *New York County Lawyers' Association* v. *Dacey et al.*, 54 Misc. 2d 564, 282 N.Y.S. 2d 985 (Sup. Ct., N.Y. Co. 1967).

The instant action was commenced under 42 U.S.C. Sections 1981, *et seq.*, commonly known as the "Civil Rights Act of 1871", seeking the remedy of injunction shortly after the decision of Special Term of the New York State Supreme Court. A motion for a temporary injunction was argued on August 30, 1967 (4a). The temporary injunction was denied by District Judge Edward C. McLean in a memorandum opinion dated October 7, 1967 (12a) on the ground that there was no clear showing that Dacey would prevail in the New York State courts. Thereafter the injunction re-

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quested in the original complaint was rendered moot by the decision of the Court of Appeals of the State of New York on December 29, 1967, reversing the lower courts and dismissing the criminal contempt proceeding brought by the respondent. *New York County Lawyers Association* v. *Dacey et al.*, 21 N.Y. 2d 694, 287 N.Y.S. 2d 422 (1967).

In reversing the Appellate Division and dismissing the respondent's petition, the Court of Appeals adopted as its opinion, by a 6 to 1 majority, the dissenting opinion of Justice Harold A. Stevens. *New York County Lawyers' Association* v. *Dacey et al.*, 28 A. D. 2d 161, 283 N.Y.S. 2d 984 (1st Dept. 1967).

On January 19, 1968, prior to respondent's service of a responsive pleading, Dacey served an amended complaint, withdrawing his request for the injunction and demanding compensatory and punitive damages under the Civil Rights Act, as well as an injunction against respondent's joinder or consultation with other bar associations to suppress the book (17a).

Reasons for Granting the Writ of Certiorari

Judge Kaufman, speaking for the Court below, in affirming the judgment of the District Court, ruled that the "* * * granting of a final injunction, despite reversal on appeal, is conclusive evidence of probable cause." (Slip op. p. 691). This traditional rule of tort law is given overreaching application when applied to the facts of Dacey's case. If the traditional defense of probable cause is made available in actions brought pursuant to the Civil Rights

Act of 1871, after courts of appeal have reached the unequivocal determination that civil rights have been infringed, the acts of falsely arresting officers and malicious prosecutors will be judicially exonerated.

This Court recognized the problems of permitting the determinations of lower state courts to shield usurping public officials in *Pierson* v. *Ray*, 386 U.S. 547 (1967), and in that case required arresting officials to stand trial in Civil Rights Act cases, notwithstanding the findings of the trial court in a prior state proceeding. There may be a common-law justification in civil actions for permitting the finding of a final injunction to be a defense to a claim for damages against the party obtaining the injunction, however, criminal courts of inferior jurisdiction may well become the tools for repression of civil rights if this rule is applied to criminal injunctive proceedings. The issue raised by this case presents the Court with an opportunity to determine whether private complainants cloaked with state authority, who have been stripped of the shield of absolute immunity by the holding of the Second Circuit in this case, may nevertheless enjoy that immunity in the furtherance of their scheme to deprive a citizen of his constitutional rights by reason of the acquiescence of one judge of an inferior court.

Judge Kaufman speaking for the Court below stated as follows:

> "The objective and effect of instituting criminal contempt proceedings for the unauthorized practice of law against Dacey were to suppress a book." (Slip op. p. 687)

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"Dacey's book was therefore protected by the first amendment's guaranty of free speech and any attempt to suppress it on the ground that it constituted the unauthorized practice of law must be scruitinized with extreme care." (Slip op. p. 688)

If *Pierson* v. *Ray, supra,* is to have meaning when applied to criminal injunctive proceedings or to proceedings under any other State statute involving summary action by state officials to inhibit freedom of speech, publication, or the public's right to know, certiorari should be granted and the issue of availability of the defense of probable cause in the Dacey case should be determined and not left to rest upon the finding in a civil case.

Where the facts of a particular action concern constitutionally protected rights, such as free speech, as in the Dacey case, the traditional rule of probable cause in the analogous situation of malicious prosecution should not be applied.

The traditional rule applied in the court below, is necessarily based upon the assumption that judges will not issue final injunctions unreasonably, because judges, are generally reasonable, intelligent and impartial observers. The facts of this case negate this assumption.

The New York County Lawyers' Association proceeded against Dacey on facts which up to then were entirely novel. Never before had an individual been prosecuted for the unauthorized practice of law because he authored a book containing legal forms and commentary for use by the public at large. Indeed, Justice Stevens, in his dissenting opinion (which opinion was later adopted by the N. Y. Court of Ap-

peals in reversing 6 to 1, the decision of the Appellate Division of the Supreme Court) clearly distinguished the case of Dacey who, journalistically advised the public at large and the case of an individual who handled legal matters for and advised individual clients face to face.

Given the legal expertise, experience and knowledge of the respondent, that respondent did not and could not have reasonably believed that Dacey was guilty of the unauthorized practice of law. No similar action had ever been brought. Clearly then it could be said that it was not probable that Dacey was guilty of unauthorized practice. Judge Kaufman shed some light on the reason for the state court proceeding:

> "The objective and effect of instituting criminal contempt proceedings for the unauthorized practice of law against Dacey were to suppress a book. The gravamen of the Association's complaint against Dacey was not that he had given specific advice to specific individuals concerning their particular legal problems. Instead, the Association acted to prevent Dacey from disseminating his views to the public generally by means of the publication and distribution of a book. Moreover, the book at which the attack was directed contained a critical discussion of an important public institution—the probate court—and of the officials who administer it and practice before it." (Slip op. p. 687)
>
> * * *
>
> "We merely note the inevitable presence of a possible conflict of interest between the purposes served by the Association and its concept of the public interest whenever it exercises its statutory power to initiate contempt proceedings under Section 750B and secure an injunction against the sale and distribution of a book critical of the profession." (Slip op. p. 689)

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Moreover, the instant petition arises from respondents' Rule 12(b) (6) motion. In deciding this motion, therefore, the Court is required to assume the truth of the allegations of the complaint.

> 2A Moore's Federal Practice, ¶12.08, (2d edition; 1968)

The complaint states that respondent commenced criminal contempt proceedings to silence and punish Dacey for his outspoken attacks on the established legal fraternity. The respondent proceeded then to subject Dacey's activities to judicial scrutiny by persons of the same background, training, temperament and profession. Given these unusual facts, does not the instant petition dictate the reversal of the doctrine of probable cause?

It is difficult for any man to serve as an "impartial" judge of one who has so pointedly criticized his own vested interests. Certainly, in view of the decision of the New York Court of Appeals, it is evident that at least several of the judges called upon to review the litigation resulting from the publication of *How to Avoid Probate!* had not been disinterested in their consideration of the arguments raised on behalf of Dacey. We are here faced with the added factor of prejudgment even though it may have been subconscious.

Under all of the above circumstances, therefore, it is not so certain that a bar association or a judge, even if consciously well meaning, will be impartial in deciding whether to commence or in judging once commenced, an unauthorized practice proceeding such as that which we call upon this court to consider. At the very least, impartiality

is not so certain that the usual rules should be given effect in this proceeding. In view of the crucial First Amendment question, the facts of this case militate against applicability of traditional legal rules.

Traditional legal rules have been overlooked by courts when presented with basic constitutional issues. This Court in *Pierson* v. *Ray*, 386 U.S. 547 (1967), reversed the Court of Appeals for the Fifth Circuit, which had held that plaintiff civil rights demonstrators could not recover from police officers if it were found that they engaged in a demonstration expecting to be illegally arrested. The Court in *Pierson*, held the traditional defense of consent not to be a defense in that particular Section 1983 action. We must surmise from that holding that the Court believed that the transcendent constitutional issues involved dictated that the traditional tort rule be overlooked. In that case, the overriding constitutional principles were equal the protection rights of demonstrators. In the case at bar, the overriding constitutional issue is the first amendment rights of free speech of the petitioner.

In *King* v. *Smith*, 392 U.S. 309 (1968) this Court refused to apply the traditional rule of exhaustion of state remedies to a case brought under Section 1983, where the constitutional challenge was sufficiently substantial as to require the convening of a three judge court.

The authority cited by the Second Circuit in its finding that probable cause was a defense to this action is not applicable because the Court relied on a case which dealt with the effect of a final injunction granted as the result of a civil proceeding. See *Salvage Process Corp.* v. *Acme Tank*

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Cleaning Process Corp., 104 Fed. 2d 105 (2d Cir. 1939), Cert. Denied 309 U.S. 599 (1939).

There is a distinction between standards necessary for application of the traditional rules of probable cause in criminal proceedings as opposed to civil proceedings. Actually, the standard of probable cause is higher in a civil case than in a criminal case giving rise to a malicious prosecution action. A malicious prosecution action may lie against the prosecutor who brings his action for predominantly personal ends and by contrived means. The dismissal of the prosecutor's complaint may well take place as soon as the allegations of the complaint are aired at a preliminary hearing. A final injunction in a civil proceeding is only granted after an extensive hearing involving all of the procedures for evidence gathering. Dacey was convicted in a summary proceeding after the Court heard argument of counsel. No factual hearing was ever held although Dacey demanded one from the outset. If the standard of proof required for a granting of a final injunction is compared to that required for a malicious prosecution action, we find a justification for protecting the validity of a final judgment of injunction in a civil case, and not nearly so much reason in the malicious prosecution case arising out of an aborted criminal charge. In essence, the protections afforded the defendant in a civil injunction proceeding are greater than those afforded Dacey in the New York criminal contempt proceeding; witness—the facts before the lower court in the Dacey matter and the inequitable result of applying a traditional probable cause defense to Dacey's claim for relief under the Civil Rights Act.

Rather than relying upon the *Salvage Process* rule, which the petitioner believes to have been incorrectly applied in the Court below, it is urged that this Court consider

the cases of *Nesmith* v. *Alford,* 318 Fed.2d, 110 (5th Cir. 1969) and *Cohen* v. *Norris,* 300 Fed. 2d 24 (9th Cir. 1962) in which both Courts held that there is no requirement that traditional tort rules apply in Section 1983 cases, but only that such traditional rules may apply, depending upon the facts involved. Petitioner urges that this Court, in view of the facts involved in this appeal, consent to review the issue of whether traditional tort rules should apply in cases brought under the Civil Rights Act for violation of one's constitutionally protected rights.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 8, 1970

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 109-10—September Term, 1969.

(Argued October 7, 1969 Decided December 8, 1969.)

Docket Nos. 33024-25

NORMAN F. DACEY and NORMAN F. DACEY, doing business as NATIONAL ESTATE PLANNING COUNCIL,

Appellants,

—v.—

NEW YORK COUNTY LAWYERS' ASSOCIATION,

Appellee.

Before:

WATERMAN, MOORE and KAUFMAN,

Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Inzer B. Wyatt, *Judge,* dismissing appellant's complaint for failure to state a claim upon which relief can be granted. Affirmed.

ARTHUR STEPHEN PENN, New York, N. Y., *for appellants.*

ARTHUR J. GOLDBERG, New York, N. Y. (Arthur L. Liman and Paul, Weiss, Goldberg, Rifkind, Wharton & Garrison, New York, N. Y., on the brief), *for appellee.*

KAUFMAN, *Circuit Judge*:

The orderly functioning of our judicial system and the protection of our citizens require that legal advice should be offered only by those who possess the requisite qualifications and authorization for the practice of law. At the same time, one of the most fundamental principles of our system of government prohibits any restraint on a citizen's right to disseminate his views on important public issues. In this case, we are called upon to resolve a conflict between these two important interests. Judge Wyatt's principal ground for dismissing the complaint was that the doctrine of immunity was an absolute bar to this litigation. We must therefore determine whether a bar association has immunity in a civil action arising out of its attempt to restrict the distribution of a book in the exercise of its statutory power to initiate prosecutions for the unauthorized practice of law.[1]

I. *Facts*

Plaintiff Norman Dacey, who is not an attorney, published a book bearing the title *How To Avoid Probate!* The

1 We find somewhat mystifying the statement of our brother Moore that in this case there is "no issue of 'restraint on a citizen's right to disseminate his views on important public issues.'" Our brother Moore concedes that the issue before us is whether "upon the facts alleged in the amended complaint" the Association is immune from suit by Dacey. One of the facts alleged in the amended complaint is that the Association's institution of proceedings against Dacey restrained him from expressing his views on an important public issue.

book was highly successful. It enjoyed a long run on the best-seller list and a sale of more than 750,000 copies. *How To Avoid Probate!* begins with a five-page criticism of the probate court system and of the lawyers who maintain and tolerate its continued existence. The criticism consists mostly of quotations from academics or the popular press and of anecdotes concerning individuals whose experiences with the probate system have been particularly unsatisfactory. Dacey sets forth illustrations of conflicts of interest on the part of probate judges and probate attorneys, of exorbitant fees charged by special guardians and court-appointed appraisers.

Having made his case that "probate" should be avoided, Dacey goes on to suggest that it is possible, indeed, easy to do so. In a few pages, he characterizes the revocable *inter vivos* trust as "a legal wonder drug," "a magic key to probate exemption." The remainder of the book's 360 pages consists largely of forms for trusts and wills, all of which are provided in duplicate, and accompanying instructions for their use.[2] The implicit suggestion is that through the use of these forms an individual may preserve almost all of his property from what Dacey views as the ravages of the probate system.

In January 1967, acting under authority conferred upon it by §750B of New York Judiciary Law,[3] the defendant

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2 The only textual matter in the final 345 pages of the book other than explanations of the forms and instructions for their use is a three-page epilogue, in which Dacey restates his indictment of lawyers and the legal system.

3 Section 750B provides:

> In addition to the power to punish for a criminal contempt as set forth in subdivision A, the supreme court has power under this section to punish for a criminal contempt any person who unlawfully practices or assumes to practice law; and a proceeding under this subdivision may be instituted on the court's own motion or on the motion

New York County Lawyers' Association instituted a proceeding to have Dacey, his publisher, and two booksellers adjudged in criminal contempt for the unauthorized practice of law and to have the sale and distribution of *How To Avoid Probate!* enjoined.[4] After a hearing, a Special Term of the New York Supreme Court refused to hold the publisher and booksellers in contempt but did adjudge Dacey in contempt and enjoin the sale and distribution of his book. *New York County Lawyers' Ass'n* v. *Dacey*, 54 Misc.2d 564, 282 N.Y.S.2d 985 (Sup. Ct. 1967). Two months after the decision of the New York Supreme Court, Dacey brought this action under the Civil Rights Act of 1871, 42 U.S.C. §1983, alleging that the commencement by the Association of criminal contempt proceedings for the unauthorized practice of law deprived him of his first amendment right to free speech, and requested that the Association be enjoined from further prosecution of the state court proceeding. Judge McLean denied Dacey's motion for a preliminary injunction, finding neither irreparable injury nor a strong probability that Dacey would prevail at trial.

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of any other officer charged with the duty of investigating or prosecuting unlawful practice of law, or by any bar association incorporated under the laws of this state.

4 The initiation of criminal contempt proceedings under §750B was not the only weapon available to the Association. Alternatively, it could have requested that Dacey be prosecuted for the unauthorized practice of law, a misdemeanor under New York Judiciary Law §485. Finally, under New York Judiciary Law §476(a), it could have filed a complaint with the attorney general, requesting that he commence a civil action against Dacey. Had the attorney general failed to take action on this request or declined to institute proceedings, the Association could then have applied to the New York Supreme Court for permission to maintain the action itself. Thus, in both of these alternative proceedings, some public official, either the court or the state attorney general, must approve the Association's decision that prosecution for unauthorized practice is warranted before proceedings may be instituted.

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Meanwhile Dacey had been pursuing his state court appeals from the decision of the New York Supreme Court. He was unsuccessful in the Appellate Division, which in October 1967 upheld the Supreme Court in a four-to-one decision, Justice Stevens dissenting. *New York County Lawyers' Ass'n* v. *Dacey,* 25 A.D.2d 161, 283 N.Y.S.2d 984 (1967). Two months later, however, the New York Court of Appeals reversed, one justice dissenting, on the reasoning of Justice Stevens' dissenting opinion in the Appellate Division. *New York County Lawyers' Ass'n* v. *Dacey,* 21 N.Y.2d 694, 287 N.Y.S.2d 422 (1967). In concluding that the sale and distribution of *How To Avoid Probate!* did not constitute the unauthorized practice of law, Justice Stevens had emphasized that the book was sold to the public at large and that no relationship of personal trust and confidence arose between Dacey and the purchasers of his book.

Fortified by his victory in the New York Court of Appeals, Dacey pressed forward vigorously in his federal court action. In an amended complaint he abandoned his now unnecessary request for a permanent injunction and substituted a demand for $1,500,000 in compensatory damages and $4,500,000 in punitive damages. He also sought to restrain the Association from cooperating with any other organization in an attempt to prevent the distribution of his book on the Association's asserted ground that it constituted the unauthorized practice of law. On October 9, 1968, however, Judge Wyatt granted the Association's motion, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss Dacey's amended complaint for failure to state a claim on which relief could be granted. Judge Wyatt concluded that immunity from suit shielded the Association from Dacey's claim for damages. He rea-

soned that because the Association was performing a prosecutorial function conferred upon it by statute in initiating the contempt proceedings for unauthorized practice against Dacey, it should occupy the same immune status accorded by law to a government prosecutor. Moreover, the district judge held that the Association could avail itself of the defense of "probable cause" and that the grant of a final injunction by the New York Supreme Court and affirmance by the Appellate Division, despite the ultimate reversal by the Court of Appeals, established probable cause for the Association's actions as a matter of law.

It should be emphasized at this juncture that we are not here concerned with the merits of this action. As this is an appeal from an order granting a motion to dismiss a complaint for failure to state a claim upon which relief can be granted, we are concerned only with the factual allegations of the complaint, and these we must accept as true. *Murray* v. *City of Milford,* 380 F.2d 468 (2d Cir. 1967); see *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.,* 382 U.S. 172 (1965); 2A J. W. Moore, Federal Practice ¶12.08, at 2266-67 & n. 3 (2d Ed. 1968). Accordingly, although the Association apparently never attempted to enforce its injunction against Dacey during the pendency of his appeals, we must assume the validity of Dacey's allegations that the mere existence of the injunction had prevented reprinting, distribution and sale of his book and inhibited the expression of the views he was espousing.

II. *Immunity*

At common law, judges could not be held liable in a civil action for acts they performed in the exercise of their judicial functions. *Bradley* v. *Fisher,* 80 U.S. (13 Wall.)

335 (1871). The only exception to this strongly rooted rule of judicial immunity arose when a judge took action in cases over which his court clearly lacked subject-matter jurisdiction. Otherwise, it mattered little that his decision was egregiously wrong or that his motives were black. In *Yaselli* v. *Goff*, 12 F.2d 396 (2d Cir. 1926), *aff'd per curiam*, 275 U.S. 503 (1927), we extended the doctrine of immunity to shield a Special Assistant to the Attorney General of the United States from an action for malicious prosecution. Goff, the Special Assistant, was alleged to have secured appointment as a prosecutor in order to further his malicious design to indict and punish the plaintiff. The absolute immunity we granted to public prosecutors in that case was based on what we believed to be sound considerations of public policy. "[P]ersons occupying such important positions and so closely identified with the judicial departments of the government," Judge Rogers reasoned, "should speak and act fearlessly in the discharge of their important official functions." "They should be no more liable," he continued, "to private suits for what they say and do in the discharge of their duties than are the judges and jurors, to say nothing of the witnesses who testify in a case." 12 F.2d at 406.

Section 1 of the Civil Rights Act of 1871, 42 U.S.C. §1983, which creates liability for the deprivation of rights under color of law and upon which Dacey bases his action, did not abolish the settled principle of judicial immunity. The Supreme Court has clearly instructed that, in the absence of a specific congressional rejection of the doctrine, the immunity of judges for acts within the judicial role must be considered to have survived the enactment of the Civil Rights Act. *Pierson* v. *Ray*, 386 U.S. 547 (1967). More recently, this court again gave its approval to the exten-

sion of the immunity granted to judges, to encompass prosecutors. *Fanale* v. *Sheehy*, 385 F.2d 866 (2d Cir. 1967). A public prosecutor thus possesses the same immunity in an action which seeks to hold him personally liable for official acts under §1983 as he does to a similar action for malicious prosecution.[5]

III. *The Prosecutorial Role of the Association*

We are of the view that when the Association instituted its proceedings against Dacey, its role was analogous to that of a public prosecutor.[6] But this is not the end of our inquiry. Chief Judge Learned Hand concluded that the decision to grant immunity to public prosecutors arose from "a balance between the evils inevitable in either alternative." *Gregoire* v. *Biddle*, 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950). To decide whether immunity should be extended to a private association performing a prosecutorial function we must strike a similar balance between the interests involved. In analyzing these interests, we discern facets to this case which cause us to pause and question the wisdom of allowing the Association

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5 Many judges have expressed doubts over the wisdom of extending immunity to shield prosecutors from civil liability under §1983. Two members of this court's panel which decided *Fanale* v. *Sheehy*, *supra*, believed that if they were writing on a clean slate "there would be some situations . . . in which even 'official' acts of a prosecuting officer should not be protected by absolute immunity from civil liability." 385 F.2d at 869 (Waterman and Feinberg, *JJ.*, concurring). There was a similar division of opinion in the Third Circuit's *en banc* decision to extend immunity to prosecutors. *Bauers* v. *Heisel*, 361 F.2d 581, 592-94 (3d Cir. 1966) (Hastie, *J.*, concurring; Biggs and Freedman, *JJ.*, dissenting), *cert. denied*, 386 U.S. 1021 (1967).

6 That the prosecutorial role of the Association is not general but limited to the enforcement of New York's prohibition of the unauthorized practice of law does not affect our decision; the Special Assistant to the Attorney General whom we cloaked with immunity in *Faselli* v. *Goff*, *supra*, was empowered to conduct only a single investigation.

to find sanctuary in the doctrine of immunity on the facts alleged in the complaint.

The objective and effect of instituting criminal contempt proceedings for the unauthorized practice of law against Dacey were to suppress a book.[7] The gravamen of the Association's complaint against Dacey was not that he had given specific advice to specific individuals concerning their particular legal problems. Instead, the Association acted to prevent Dacey from disseminating his views to the public generally by means of the publication and distribution of a book. Moreover, the book at which the attack was directed contained a critical discussion of an important public institution—the probate court—and of the officials who administer it and practice before it.

The first amendment embodies "a profound national commitment to the principle that debate on public issues [such as the performance of the probate court system] should be uninhibited, robust, and wide-open." *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). The value of Dacey's views is not lessened because they were presented principally in the form of quotations and anecdotes. Judging from the wide circulation which the book received, this format was extremely effective. Nor does it matter that the opinions expressed were contained in a book comprised largely of legal forms. The argument Dacey sought to

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7 Although only one of the five paragraphs of the injunction referred specifically to the sale and distribution of "writings," the Association never presented any evidence of acts performed by Dacey within the jurisdiction of the state of New York other than the sale and distribution of *How To Avoid Probate!* which might support a prosecution for unauthorized practice. We therefore accept the manner in which Justice Stevens framed the issue: "the question may be briefly and baldly expressed: Does the writing, publication, advertising, sale and distribution of 'How to Avoid Probate!' constitute the unauthorized practice of law within the meaning of Section 750(B)?" 283 N.Y.S.2d at 997.

press upon the public—the virtue of which we do not pass upon—was that the infirmities of the probate system required every thoughtful person to avoid the administration of his estate by the probate court. Given this viewpoint, the forms which comprised the bulk of *How To Avoid Probate!* buttressed Dacey's argument that the goal he advocated was not only desirable but feasible. Dacey's book was therefore protected by the first amendment's guarantee of free speech and any attempt to suppress it on the ground that it constituted the unauthorized practice of law must be scrutinized with extreme care. This is not to say, however, that the inhibiting effect of the Association's action on protected speech is dispositive of the issue before us. An overzealous public prosecutor may create an unjustified restraint on expression by bringing a completely unwarranted prosecution for obscenity and still be immune from damages in a civil action. Thus, although the restriction on freedom of expression induced by the Association's attempt to prevent the distribution of Dacey's book to the public does not completely resolve the question in this case, it is an important factor to be weighed in the balance.[8] And, it

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8 As we have stated, at common law a judge retained his immunity even if his decision was clearly incorrect; he lost his immunity only if he decided a case over which his court clearly lacked subject matter jurisdiction. *Bradley* v. *Fisher*, 80 U.S. (13 Wall.) 335 (1871). This distinction between a mere excess of jurisdiction and a clear absence of jurisdiction has been applied to prosecutors as well as judges. *Bauers* v. *Heisel*, 361 F.2d 581 (3d Cir. 1966) (*en banc*), *cert. denied*, 386 U.S. 1021 (1967).

It would thus be possible to deny the Association immunity on the ground that it clearly lacked jurisdiction to impede the dissemination of ideas to the public generally. However, in our view, the distinction between a lack of jurisdiction and an excessive use of jurisdictional power is artificial and overly conceptual. Whether the Association may successfully claim immunity in this case should depend not on the formal characterization of its actions, or the "pigeonhole" into which they fall, but rather on the relative weight of the interests which its actions furthered and those which it frustrated.

provides a context within which the actions of the Association must be viewed.[9]

Dacey urges that the intended result of the Association's action was to eliminate an actual or potential competitor of its members. In initiating unauthorized practice proceedings, he argues, the members of the Association were directly serving their own pecuniary interest in a manner in which a public prosecutor who begins a case or a judge who decides it is not. We need not pass judgment on the merits of these contentions. We merely note the inevitable presence of a possible conflict of interest between the purposes served by the Association and its conception of the public interest whenever it exercises its statutory power to initiate contempt proceedings under §750B and secures an injunction against the sale and distribution of a book critical of the profession.

Finally, we note that at the summary hearing held before the New York Supreme Court in April 1967, only argument of counsel was heard; there was no inquiry into the facts, nor was any evidence presented that Dacey's book had misled anyone.[10]

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9 It is upon this ground that we distinguish the decision of the Court of Appeals for the Ninth Circuit in *Clark* v. *Washington*, 366 F.2d 678 (9th Cir. 1966). In *Clark* a bar association was granted immunity in an action brought under the Civil Rights Act by an attorney whom the association had succeeded in disbarring. Clark was disbarred for two violations of the Canons of Professional Ethics; he made no allegation that the disbarment proceeding had restrained him from expressing his views on public issues.

10 As we have noted above, see note 4, instead of commencing summary contempt proceedings, the Association could have requested the Attorney General to begin a civil action against Dacey under §476(a) of the New York Judiciary Law. Both parties make much of a statutory immunity applicable to unauthorized practice proceedings brought under §476(a). Section 476(b) of the New York Judiciary Law provides that a bar association shall not be liable for certain damages sustained as a result of maintaining a civil action under §476(a). Dacey con-

For all of these reasons, we conclude that it would be unwise to grant the Association immunity in this case. We do not suggest, however, that immunity would be unavailable to the Association in a case in which it had sought to enjoin an unauthorized practitioner from proffering to specific individuals legal advice relating to their specific problems or had instituted proceedings to disbar an attorney.[11]

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tends that the absence of a similar provision in §750B suggests that the Association has no immunity to a claim for damages arising out of its initiation of summary contempt proceedings under that section. This contention rests on a misreading of §476(b). That section allows the plaintiff in a civil action brought under §476(a) to secure a temporary restraining order, a form of relief unavailable under §750B, and releases him from the usual requirement of posting a bond before a restraining order may be issued and from liability for damages sustained by reason of the issuance of a restraining order which is later determined to have been unwarranted. Since a bar association cannot secure a temporary restraining order in contempt proceedings initiated pursuant to §750B, there is no reason why that section should contain a specific immunity provision comparable to that set forth in §476(b).

On the other hand, contrary to the contentions of the Association, a bar association's immunity from claims for damages resulting from a temporary restraining order secured under §§476(a)-(b) does not require that it be granted a similar immunity from damages which flow from the sanctions imposed under §750B. Since a bar association may not commence an action under §476(a) without the approval of the attorney general or the New York Supreme Court, it is less likely that unwarranted prosecutions for unauthorized practice will be initiated under that section than under §750B.

11 Our brother Moore suggests that the majority has based its decision on irrelevant considerations. As we understand his concurrence, the charge of "irrelevancy" is not directed at the entire discussion of the immunity issue, but at our analysis of Dacey's first amendment rights and the possible conflict of interest inherent in the Association's prosecutorial role. Our decision represents a refusal to extend the doctrine of immunity to encompass the situation before us on this appeal, and the discussion concerns those factors which distinguish this case from others in which the doctrine has been applied. Nor do we understand how our statement that the result we reach today may not obtain in different factual contexts can be construed as an "advisory opinion." It is the antithesis of an advisory opinion; we are specifically disclaiming any attempt to decide controversies not presently before us.

Our decision on this appeal, however, does not rest on our disposition of the issue of immunity.

IV. *Probable Cause*

Just as the public's interest in having access to Dacey's criticism of the courts of probate prevents us from granting absolute immunity to the Association in this case, an equally strong public interest in preventing the unauthorized practice of law requires that the defense of "probable cause" to initiate a prosecution under §750B be available to the Association. We believe that failure to afford the Association this defense might well preclude vigorous enforcement of the laws prohibiting unauthorized practice. In such event, the Association would be compelled to proceed with excessive timidity and restrict its prosecutions only to those cases in which the violation was clear beyond all doubt.

Accordingly, we agree with the conclusion of the district court that, as a matter of law, the Association had probable cause to initiate unauthorized practice proceedings against Dacey. The Association's request for a permanent injunction was granted by the New York Supreme Court and affirmed by the Appellate Division before Dacey ultimately prevailed in the Court of Appeals. The law is clear in this circuit that the "granting of a final injunction, despite reversal on appeal, is conclusive evidence of probable cause." [12] *Salvage Process Corp.* v. *Acme Tank Cleaning*

12 Dacey urges that the grant of a final injunction should not be considered to be conclusive evidence of probable cause and consequently demands a hearing on the issue of probable cause. He bases his arguments on the Supreme Court's decision in *Pierson* v. *Ray*, 386 U.S. 547 (1967), that a conviction at trial did not automatically establish that a peace officer had probable cause to make the arrest which led to the conviction.

(*continued on following page*)

Process Corp., 104 F.2d 105 (2d Cir.), *cert. denied*, 308 U.S. 599 (1939). The judgment of the district court is therefore affirmed.[13]

WATERMAN, *Circuit Judge* (concurring):

I concur in affirming the dismissal of the complaint. I agree with my brother Kaufman and with the court below, *Dacey* v. *New York County Lawyers' Association*, 290 F. Supp. 835, 842 (1968) that the Association, as a matter of law, had probable cause to initiate unauthorized practice proceedings, and therefore that the dismissal of the action which is based upon the Civil Rights Act of 1871, 42 U.S.C. §1983, was proper. In his concurring opinion my brother Moore also accepts this ground as a dispositive one.

I agree with Judge Kaufman that due respect for the First Amendment cautions us that it would be unwise to affirm the judgment below upon the added ground relied upon by the district court and by Judge Moore that in the circumstances here the Association is clothed with the immunity from suit enjoyed by New York State public prosecutors. It is clear that the objective of the Association in instituting its special proceedings in the New York courts against Dacey, a non-lawyer, was to suppress his book

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Since this case involved no ex parte restraint on Dacey's liberty, we find the analogy to malicious prosecution far more compelling than any analogy to false arrest. As we stated, in an action for malicious prosecution, the granting of a final injunction conclusively establishes the defense of probable cause. *Salvage Process Corp.* v. *Acme Tank Cleaning Process Corp., supra.*

13 In addition to damages, Dacey sought to enjoin the Association from cooperating with any other bar association in an attempt to restrict the distribution of his book. Given the absence of any showing that the Association was contemplating any such action, Judge Wyatt's dismissal of this claim was entirely proper.

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"How to Avoid Probate!" and to prevent the views expressed therein from being available to the general public.

I am unable to reconcile a desire to have "book burning" judicially approved because a non-lawyer's book contains derogatory remarks about our profession with the power to prosecute for unauthorized practice of the profession. Indeed, I heartily approve of this grant of power to the Association for it is necessary to repose it in those learned in the law if our profession is to preserve its great ideals through membership therein of none other than those individuals qualified by learning and training to render personalized legal professional service. Non-lawyers should not be permitted to render that service.

MOORE, *Circuit Judge* (concurring in the result):

Although I concur in the affirmance of the judgment dismissing the complaint, my reasons for so doing are quite different from those expressed in the majority opinion. Initially I find here no issue of "restraint on a citizen's right to disseminate his views on important public issues * * *." Upon this appeal the only issue before us is: does the amended complaint on its face state a cause of action? Nor is there any issue as to whether Dacey's acts constitute the unlawful practice of law. That issue has been laid at rest by the New York Court of Appeals. No judge is being sued—hence, judicial immunity is not involved. The issues of free speech and the suppression of a book or of Dacey's "views to the public generally by the means of the publication and distribution of a book" are not before us. The only question stated more extensively is: is the Association upon the facts alleged in the amended complaint immune from actionable suit by Dacey for having proceeded (ultimately unsuccessfully) against him for the unauthorized practice of law?

No answer has been interposed. No "defense" of immunity has been pleaded. Therefore the failure to state a claim must be found in the nature of the suit itself—in effect, the disclosure of facts from which a built-in immunity may be derived. The decisions leave no doubt that such immunity may be presented upon the motion to dismiss.[1]

Looking at the amended complaint itself, despite Dacey's allegations that the Association's proceedings "were undertaken by defendant solely for the purpose of preventing the plaintiff from criticizing and speaking out in opposition to the practices of certain lawyers, judges and courts whose management of decedents' estates was improper" and to prevent the sale of his book, the amended complaint adequately discloses that the Association sought to and did for a period of time enjoin Dacey from the unauthorized practice of law. The motives, the purposes, the conspiracy and the malice allegedly may all be assumed. In fact it is into these very motives and purposes that Dacey would seek to probe upon a trial. And it is for this very reason that the courts so uniformly have erected a barrier for the public good against such a happening.

Whence is derived this immunity claim by the Association? The Legislature has seen fit to grant the right to institute a proceeding against unlawful practice to court, other officer or any bar association. The means whereby such an association may proceed are pointed out by the court below, i.e., (1) by criminal prosecution; (2) by a civil action under Judicial Law §476-a; and (3) by summary proceedings under §750B. Where as here the relevant

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1 *Bauers* v. *Heisel*, 361 F.2d 581 (3d Cir. 1966) (see footnote 7 of *Bauers*, page 586, for citations of 47 cases relevant to the immunity question); *Byrne* v. *Kysar*, 347 F.2d 734 (7th Cir. 1965).

facts are undisputed, namely, the proceedings themselves, the §750B approach was warranted. Dacey argues that §476-a should have been used so that the Attorney General could have decided whether in his opinion the complaint was well founded and whether a proceeding should be commenced; and that only by this procedure could immunity under §476-b be achieved. However, the immunity section was added to §476 merely to eliminate the potential liability against which a bond was required in the event that a temporary restraining order was desired. As the Attorney General at the time (1958) stated in his memorandum to the Legislature, "in prosecuting such [unauthorized practice] actions bar associations are therefore performing the same public functions as the Attorney General or any other public law enforcement official. * * * It is only just and proper that when a bar association functions as a law enforcement agency, under statutory authority, it should enjoy the same immunity from liability for costs and damages as that extended elsewhere in the law to public officials performing the same duties." (New York State Leg. Annual 1958, p. 11.) Since the Legislature has equated bar associations with courts and prosecuting officers, the law applicable to them should be equally applicable to the Association here.

The Association in previous proceedings has been recognized in its prosecutorial role. *In re Bercu*, 873 A.D. 524, 78 N.Y.S.2d 209 (1st Dept. 1948), *aff'd* 299 N.Y. 728; *In re Roel*, 3 N.Y.S.2d 224, 165 N.Y.S.2d 31 (1957), *app. dism.* 355 U.S. 604 (1958). Dacey's fear of the Association acting as a vigilante committee cannot be reconciled with the vigilante concept which normally embraces the thought of apprehension, trial and execution of judgment, all by the vigilantes. In marked contrast, Dacey has been afforded

every step of due process in the courts. The cases, therefore, involving police officers have no bearing as precedential value on the decision here.[2]

What Dacey desires is "his day in court to test the motives of the defendant-appellee [the Association] in using the procedure it chose, on such a novel issue before a hostile court."[3] (Dacey brief p. 13.) But this "day" (if he wishes to test the motives of the committee or the members of the largest local bar association in the United States, the "day" could become weeks or months) in court is exactly what the courts have decided is not in the public interest.

A few sentences from decisions, in which the courts have had to cope with arguments similar to those now advanced by Dacey, will suffice as a guide to the correct result here. The recognition of a common law immunity for judges from tort actions was made by the United States Supreme Court in *Bradley* v. *Fisher*, 80 U.S. 335 (1871). Justice Field's opinion justifies the privilege in terms of freedom from "vexatious litigation" and "apprehension of personal liabil-

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2 In *Monroe* v. *Pape*, 365 U.S. 167 (1961), the Supreme Court reversed the dismissal of an action against state police officers. A cause of action was found to be stated under §1 of the 1871 Civil Rights Act, 42 U.S.C. §1983. In *Pierson* v. *Ray*, 386 U.S. 547 (1967), the immunity of state police officers was considered. The common law had never granted an absolute immunity to police officers, but did allow the defense of good faith and probable cause. Since the same considerations present in common law actions were present in §1983 actions, the Court held that the defense was available to police officers sued under §1983. 386 U.S. at 555, 557.

3 Presumably Dacey refers to the five judges (Special Term and four Appellate Division) who ruled against him because he stated ". . . it is not unlikely that many of the judges who held against Dacey in the lower courts of New York, were themselves members of the New York County Lawyers Association." (Dacey brief p. 13.) Yet Dacey and his attorney did not suggest disqualification or even hostility on the part of Judge Wyatt, who advised them of his membership in the Association.

ity" that would hamper judges in the discharge of their judicial functions. The immunity was described as being

> "not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences." 80 U.S. (13 Wall.) at 350, quoting from *Scott* v. *Stansfield*, L.R. 3 Ex. 220, 223 (1868).

In *Spalding* v. *Vilas*, 161 U.S. 483 (1896), the Court granted a similar absolute privilege to the Postmaster General in a defamation action.

The Second Circuit has long recognized the need to extend the immunity granted to judicial officers to public prosecutors.[4] In *Yaselli* v. *Goff*, 12 F.2d 396 (2d Cir. 1926), *aff'd per curiam* 275 U.S. 503 (1927), a Special Assistant to the Attorney General, who had been appointed to prosecute the plaintiff, was alleged to have prosecuted an indictment maliciously and without probable cause. This Court held that:

> "[A] special assistant to the Attorney General of the United States, in the performance of his duties imposed upon him by law, is immune from a civil action for malicious prosecution based on an indictment and prosecution, although it results in a verdict of not guilty rendered by a jury. The immunity is absolute, and is grounded on principles of public policy. The public interest requires that persons occupying such

4 The most relevant and recent case in this area is the decision by this Court in *Fanale* v. *Sheehy*, 385 F.2d 866 (1967), in which it was stated:

> "If, then, as we hold, the complaint's allegations as to [a county district attorney] are confined to official action, he, too, is entitled to immunity." 385 F.2d at 868.

important positions and so closely identified with the judicial departments of the government should speak and act freely and fearlessly in the discharge of their important official functions. They should be no more liable to private suits for what they say and do in the discharge of their duties than are the judges and jurors to say nothing of the witnesses who testify in a case." 12 F.2d at 406.

In the front rank of cases establishing an immunity from common law actions for malicious prosecution is *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949), *cert. denied* 339 U.S. 949 (1950). In dismissing this suit against two successive Attorneys-General of the United States, two successive Directors of the Enemy Alien Control Unit of the Department of Justice, and the District Director of Immigration at Ellis Island, Chief Judge Learned Hand stated:

"... to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." 177 F.2d at 581.

The justification given for immunity involved a balancing of the evils that were inevitable in either alternative. This balancing revealed that it was:

"better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation." 177 F.2d at 581.

Where a court-appointed commission of two doctors is authorized by statute, immunity has been extended to them

even though the plaintiff in his suit had alleged that by the defendants' intentional actions he had been illegally committed and that, therefore, he was entitled to damages under the civil rights laws. The Seventh Circuit said:

> "Drs. Fein and Imbiorski as members of the court-appointed statutory commission share the court's judicial immunity, and in the performance of their quasi-judicial functions are not subject to suit under the sections of the statute here involved." *Byrne* v. *Kyser*, 347 F.2d 734, 736 (1965), *cert. denied* 383 U.S. 913 (1966).

The entire purpose of immunity would be defeated if an allegedly aggrieved plaintiff by charges of malice and self-interest by a bar association could subject its members, or a committee thereof, to a trial in an endeavor to probe into such motives. In *Gregoire* the Court stated:

> "[I]t can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine. What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him." 177 F.2d at 581.

Even though these common law immunities are called "absolute," there have always been limitations placed upon them. Common formulations of that limitation have in-

cluded the requirement that "the official's act must have been within the scope of his powers," *Gregoire, supra,* and that "a distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject matter," *Bradley, supra,* 80 U.S. (13 Wall.) at 351. Thus, any limitation must be understood in terms of the scope of the official's duties, and not in terms of either any malice which might have motivated the official or any lack of probable cause which might have justified the action. But here there is no question that the action of the Association was within the scope of the powers bestowed by §750B of the Judiciary Law. Mr. Justice Frankfurter answered Dacey's present argument, seeking to obtain a trial, in *Tenney* v. *Brandhove,* 341 U.S. 367 (1951) wherein he said:

> "The claim of an unworthy purpose does not destroy the privilege. Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. • • • The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives" (377).

In the *Tenney* case, a committee of the legislature had acted but here statutory authority has been expressly bestowed upon bar associations. Thus the admonition in *Tenney* is applicable, namely:

> "The courts should not go beyond the narrow confines of determining that a committee's inquiry may be fairly deemed within its provinces" (378).

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Nor can any legal distinction be derived from the difference between action by an integrated bar and the statutorily authorized Association. Therefore the grant of immunity against a suit by a disbarred attorney is most relevant here.[5] As to such a suit under civil rights laws, the Ninth Circuit said:

> "As an arm of the Washington Supreme Court in connection with disciplinary proceedings, the Bar Association is an 'integral part of the judicial process' and is therefore entitled to the same immunity which is afforded to prosecuting attorneys in that state." *Clark* v. *State of Washington*, 366 F.2d 678, 681 (9th Cir. 1966).

Thus, in my opinion, the decisions support the syllogism that (1) the judiciary is immune from liability for damage claims brought under §1983, (2) public prosecutors are quasi-judicial officials, (3) the Association is performing the same role as a public prosecutor here, therefore, (4) the Association is immune in this case upon the facts as pleaded.

The District Court, therefore, correctly granted absolute immunity because "the Association when it acts under Judiciary Law §750B is a part of the judicial process." 290 F. Supp. 841-42 (S.D.N.Y. 1968). This conclusion is uni-

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5 The majority would distinguish the decision in *Clark* v. *Washington*, 366 F.2d 678 (9th Cir. 1966) by relying upon the absence of the "allegation that the disbarment proceeding had restrained [the disbarred attorney] from expressing his view on public issues." It should be noted that the allegations of a deprivation of constitutional rights under the Fourth, Eighth and Fourteenth Amendments did not prevent the Ninth Circuit from finding absolute immunity for the Bar Association.

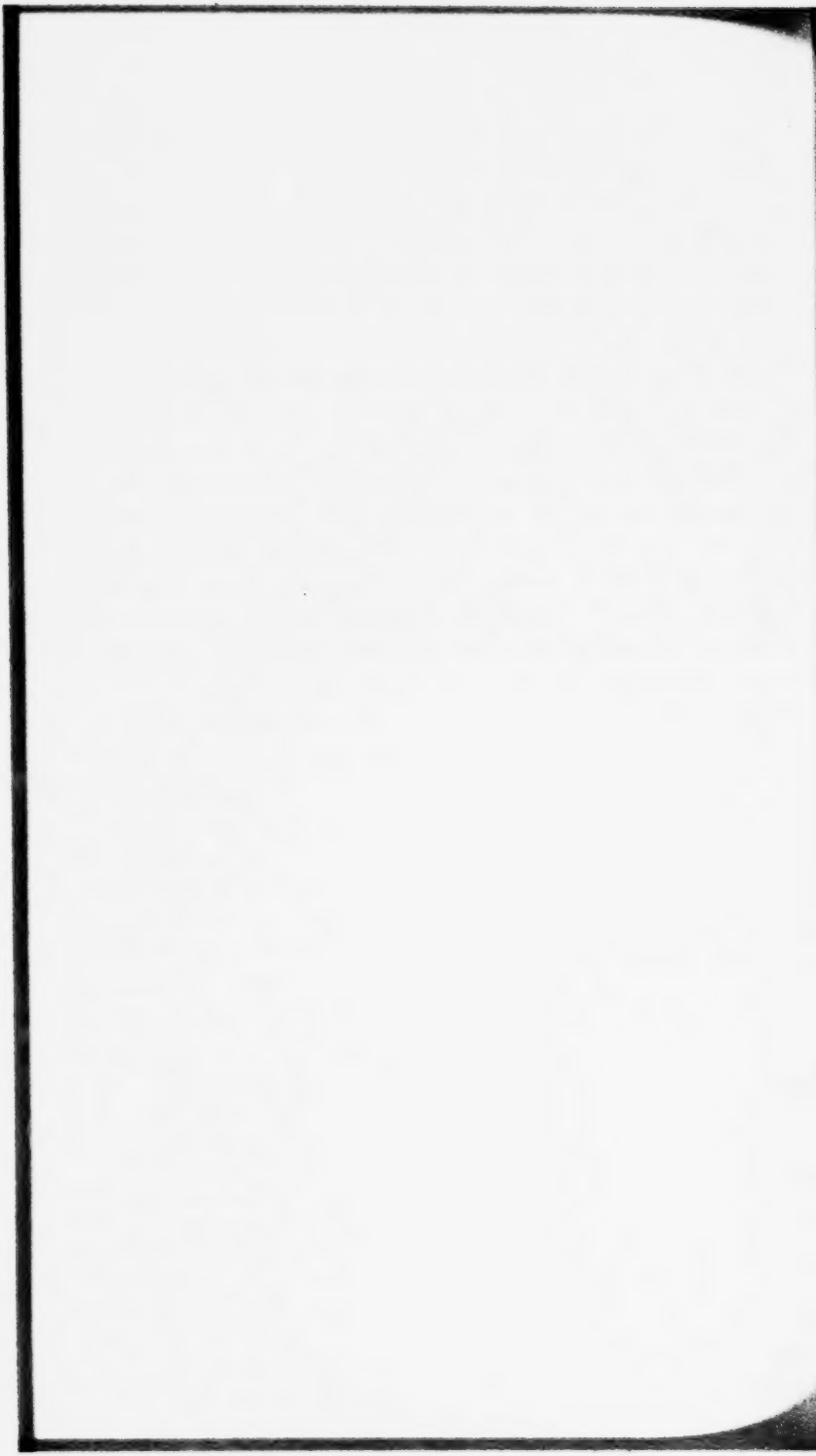
formly supported by the decisions of the New York courts and the United States Supreme Court.

In view of the nature of the narrow issue before us, I must take issue with that portion of the majority's opinion entitled "III. The Prosecutorial Role of the Association," first, because it does not reflect the existing pertinent law and, second, because in my opinion it is entirely irrelevant to the only question before us. The law as to immunity as thus far written does not depend upon a finding by an appellate court that it would be "unwise to grant the Association immunity in this case" or because its concept of the public's interest "prevents [it] from granting absolute immunity to the Association in this case." Such a hypothetical situation is not before us. Nor should we give advisory opinions as to such future situations as may arise with respect to the giving of unauthorized advice to "specific individuals." Furthermore, the hypothesis that "an overzealous public prosecutor may create an unjustified restraint on expression by bringing a completely unwarranted prosecution for obscenity and still be immune from damages in a civil action" is no justification for lessening the immunity privilege. I find no relationship between the public policy involved in granting to the Association the power to protect against the unauthorized practice of the law and any inhibition of free speech.[6] And I do not accept

6 The majority say that "The objective and effect of instituting criminal contempt proceedings for the unauthorized practice of law against Dacey were to suppress a book" and that "the Association acted to prevent Dacey from disseminating his views to the public generally by means of the publication and distribution of a book." By these assumptions, the majority would create "free speech" issues. The injunction against the sale of his book, although ultimately reversed by the New York Court of Appeals, was a consequence of the state trial court's finding that it constituted the unauthorized practice of law. Therefore, it would seem fallacious to construe the mere institution of such a proceeding as an act to suppress criticism of existing probate practices.

"the inevitable presence of a possible conflict of interest between the purposes served by the Association and its conception of the public interest whenever it exercises its statutory power to initiate contempt proceedings under §750B." Nor are wrongfulness or malice determining factors because allegedly wrongful acts were present in the analogous complaints dismissed for failure to state a claim. Thus I would hold that the Association upon the facts pleaded in the amended complaint is entitled to absolute immunity from Dacey's suit.

Since, however, the law in this Circuit is that the "granting of a final injunction, despite reversal on appeal, is conclusive evidence of probable cause," *Salvage Process Corp.* v. *Acme Tank Cleaning Process Corp.*, 104 F.2d 105, *cert. denied* 308 U.S. 599 (1939), and since this fact appears in the amended complaint, I accept this ground for dismissal of the amended complaint despite my belief that there is inconsistency in denominating "probable cause" a "defense" on a motion to dismiss for failure to state a claim.



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Judgment Below

UNITED STATES COURT OF APPEALS

For the Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighth day of December one thousand nine hundred and sixty-nine.

Present:

Hon. Sterry R. Waterman,
Hon. Leonard P. Moore,
Hon. Irving R. Kaufman,
Circuit Judges.

Norman F. Dacey and Norman F. Dacey doing business as National Estate Planning Council,
Plaintiffs-Appellants,

v.

New York County Lawyers' Association,
Defendant-Appellee.

(and another case)

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs to be taxed against the appellants.

A. Daniel Fusaro
Clerk

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Supreme Court of the United States

October Term, 1969

No. 1406

NORMAN F. DACEY & NORMAN F. DACEY, doing business as NATIONAL ESTATE PLANNING COUNCIL,
Petitioners,

against

NEW YORK COUNTY LAWYERS' ASSOCIATION,
Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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April 8, 1970

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Opinion of McLean, D. J. dated October 9, 1967

[SAME TITLE]

Appearance

Arthur Stephen Penn
Attorney for Plaintiff
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McLean, D.J.

This is an action to enjoin defendant New York County Lawyers' Association (the Association) from prosecuting a proceeding in the Supreme Court, New York County, in which the Association seeks to restrain plaintiff from engaging in what the Association claims to be the unlawful practice of law. Plaintiff moves for a preliminary injunction. The facts are undisputed and may be briefly summarized as follows:

Plaintiff Norman F. Dacey describes himself as a "professional estate planner." He is not a lawyer. He does business under the trade name of "National Estate Planning Council." He resides in Connecticut where at one time he engaged in giving legal advice to clients with respect to wills, trusts, and other estate matters. He was enjoined from so doing by the Connecticut courts.

Grievance Committee of the Bar of Fairfield County v. *Dacey*, 154 Conn. 129, 222 Atl. 339 (1966), *appeal dismissed*, 386 U. S. 683 (1967)

Opinion of McLean, D. J. dated October 9, 1967

Dacey has written a book entitled *How To Avoid Probate!* The book has been published and has had a wide distribution. The front cover states that the work is by "one of America's leading professional estate planners" and that it is a "publication of the National Estate Planning Council." The back cover states that "Norman F. Dacey is America's best-known professional estate planner." The book is very critical of probate courts and probate procedure. It advocates avoidance of probate by use of the inter vivos trust, which it characterizes as the "magic key to probate exemption, a legal wonder drug which will give you permanent immunity from the racket." At p. 13.

Some thirty-nine pages of this 362-page book are devoted to the author's text. The great bulk of the book consists of forms of various legal instruments, including many different declarations of trust, as well as wills, quitclaim deeds, etc. Each instrument is prefaced by "instructions" for filling it out. The instructions state that the instrument will be "suitable for use" for this or that purpose, depending on the terms of the instrument.

The back of the book contains a four-page glossary of legal terms and a convenient two-page order blank addressed to National Estate Planning Council which can be used for the purchase of additional sets of forms.

In January 1967 the Association instituted a proceeding in the Supreme Court pursuant to Section 750B of the New York Judiciary Law, seeking an order adjudging Dacey in contempt of court and enjoining him from distributing in the State of New York *How To Avoid Probate!* and the forms contained therein. The Supreme Court granted the Association's application by memorandum decision filed June 30, 1967. An order was entered

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upon this decision on September 6, 1967. It adjudged that Dacey is guilty of criminal contempt of court and imposed a fine upon him of $250. It enjoined him from assuming to practice law in the State of New York, holding himself out to the public of the State of New York as being qualified to give legal advice, representing that any form, writing, or other instrument is legally sufficient for specific legal purposes, and selling such forms. The order provides that the injunction shall apply regardless of whether the forms are distributed in conjunction with a book, but it further provides that nothing in the order shall prohibit, limit, or restrict Dacey from expressing any opinion with regard to any law, decision, procedure, or subject "not specifically hereinabove described," from communicating any information concerning the content of any such law, decision, or procedure, or from advising any change or amendment thereto.

Dacey appealed from the order of the Supreme Court to the Appellate Division, First Department. This court has been advised that subsequent to the argument of the present motion, Dacey's appeal was placed upon the calendar of the Appellate Division for argument on September 26, 1967, and that the Association has agreed not to attempt to enforce the Supreme Court's order pending the outcome of the appeal. As far as appears, the appeal has not yet been decided.

Plaintiff contends that the proceeding in the New York court and the order of the New York court violates plaintiff's constitutional rights under the First and Fourteenth Amendments.

Jurisdiction of this action is alleged under 28 U.S.C. § 1331 because the action arises under the Constitution, and also under 28 U.S.C. § 1343 because the action is

based upon the civil rights statute, 42 U.S.C. § 1983, which provides that every person who, "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects . . . any citizen of the United States . . . to the deprivation of any rights . . . secured by the Constitution . . . shall be liable to the party injured . . . ."

In 28 U.S.C. § 2283 it is provided that:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

This statute applies here, for although the injunction requested is in form one against the moving party in the state court action, in substance plaintiff seeks a stay of proceedings in the state court.

> *See Studebaker Corporation* v. *Gittlin*, 360 F. 2d 692, 696 (2d Cir. 1966)

The statute states in effect that this prohibition of an injunction does not apply where an injunction is "expressly authorized by Act of Congress." Whether the civil rights statute is such an Act of Congress within the meaning of 28 U.S.C. § 2283 has not been decided by the Supreme Court.

> *See Stevens* v. *Frick*, 372 F. 2d 378, 381 (2d Cir. 1967)

It is not necessary to decide that question on this motion, for even assuming that the civil rights statute is such an exception, and hence that 28 U.S.C. § 2283 does not bar an injunction, still the relief presently asked by

plaintiff should not be granted. On this motion we are concerned with an application for an injunction pendente lite. The court is satisfied that the moving papers do not make a sufficiently strong showing to entitle plaintiff to that relief. Plaintiff has an opportunity to raise his constitutional objections in the state court proceeding, as he is doing. If the state court overrules them, he may seek review by the Supreme Court of the United States, as he attempted to do on similar grounds in the Connecticut action.

Plaintiff has made no showing of irreparable injury. He is not at the moment prevented from selling the forms contained in his book, for the parties have agreed that the order of the Supreme Court, New York County, will not be enforced pending appeal. Moreover, in the court's opinion plaintiff has not demonstrated a strong probability of success upon the ultimate trial of this action. It is difficult for the court to see how plaintiff's rights of free speech have been infringed by a court order restraining him from giving legal advice in the manner disclosed by the record in this case.

Considerations of comity between federal and state courts also weigh heavily against the issuance of a preliminary injunction.

See Stevens v. *Frick, supra.*

The court believes that a proper exercise of its discretion required a denial of interlocutory relief in this case.

This opinion constitutes the court's findings of fact and conclusions of law.

Motion denied.

So ordered.

Dated: October 7, 1967

/s/ EDWARD C. McLEAN
U.S.D.J.

Opinion of Wyatt, D. J. dated October 9, 1968

[SAME TITLE]

Appearances:

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ROBERT L. BEERMAN, ESQ.
Of Counsel.

WYATT, District Judge,

This is a motion by defendant New York County Lawyers' Association (The Association) for an order dismissing the action because the amended complaint fails to state a claim upon which relief can be granted (Fed. R. Civ. P. 12(b)(6).

The motion must be granted.

I.

Plaintiff Dacey, who is not a lawyer, is the author of a book "How to Avoid Probate!" (the Book). The nature

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of the Book is thus described in the amended complaint: "The Book is a strong criticism of the probate court system and lawyers engaged in trusts and estates practice and sets ways and means of avoiding both. The Book contains various forms and explanatory material dealing with decedents' estates and lifetime trusts". The Book was published in November 1965.

Defendant Association is a membership corporation organized in 1908 under the Membership Corporations Law of New York. The members of the Association are lawyers practicing in New York County; there are many such members and it is believed to be the largest bar association in the United States. (I am a member of the Association and have been for some years; after being so advised at the oral argument, plaintiff and his attorney stated that they did not suggest any disqualification.)

A membership corporation in New York is by definition "a corporation not organized for profit" (Membership Corporations Law, § 2). That law also has the following special provision for bar associations (§ 11(7)):

> "The corporate purposes of a bar association shall be cultivating the science of jurisprudence, promoting reforms in the law, facilitating the administration of justice, elevating the standard of integrity, honor and courtesy in the legal profession, cherishing the spirit of brotherhood among the members thereof, and such kindred purposes as may be stated in the certificate. The incorporators shall be members of the bar in active practice."

The Association is thus a non-profit organization of lawyers having among others the purposes just stated.

The Judiciary Law of New York gives the Supreme Court power to punish for a criminal contempt "any person who unlawfully practices or assumes to practice law"

(§ 750 B). The same section provides that a proceeding for such punishment may be instituted "on the court's own motion or on the motion of any officer charged with the duty of investigating or prosecuting unlawful practice of law, or by any bar association incorporated under the laws of this State".

In January 1967, the Association, acting under Judiciary Law § 750 B, filed a petition instituting a summary proceeding in the Supreme Court, New York County, to adjudge in contempt and to enjoin Dacey and also the publisher of the Book and two retail booksellers.

On June 28, 1967, Mr. Justice Marks handed down an opinion finding Dacey in contempt because he was engaged through the Book in the unlawful practice of law; Mr. Justice Marks stated in his opinion that Dacey and the other respondents should be enjoined (54 Misc. 2d 564, 282 N.Y.S. 2d 985 (Sup. Ct. 1967)).

Before a judgment had been entered on the opinion of Mr. Justice Marks, this action was commenced in this Court on August 7, 1967. The complaint averred that the decision of Mr. Justice Marks and the prosecution by the Association of the contempt proceeding was an illegal and unconstitutional restraint on the freedom of speech and of the press guaranteed by the First and Fourteenth Amendments to the Constitution of the United States and by the civil rights laws (42 U.S.C. § 1981 and following). The jurisdiction of this Court was said to be based on 28 U.S.C. §§ 1331 and 1343. The relief asked was an injunction restraining the Association from further prosecuting the contempt proceeding and from enforcing any injunction granted by the State Court.

A judgment on his opinion was signed by Mr. Justice Marks and entered on September 6, 1967. Plaintiff promptly appealed to the Appellate Division, First Department. The Association agreed that, pending decision

of that appeal, it would not attempt to enforce the State Court judgment.

In the case at bar, an application for a preliminary injunction was made by plaintiff to Judge McLean. On October 9, 1967, this application was denied, principally (a) because the constitutional and other claims could be, and were, raised in the State Court proceedings and (b) because, since the Association was not attempting to enforce the State Court order, there was no irreparable injury to plaintiff.

On October 24, 1967, the Appellate Division, by a vote of 4 to 1, affirmed the judgment of the New York Supreme Court as to plaintiff but modified the judgment as to the other respondents (25 A.D. 2d 161, 283 N.Y.S. 2d 984). The majority was made up of Justices Eager, Capozzoli, Tilzer and McNally, with majority opinion by Mr. Justice Eager. There was a dissenting opinion by Mr. Justice Stevens. The dissenting opinion emphasized that the publication of a book—even if it be a legal text—does not amount to the practice of law, that publication of legal forms is not the practice of law, that buying the Book is not an employment of plaintiff as a lawyer but rather an attempt by the purchaser to be his own lawyer, and that the relationship between an author and the purchaser of his book is not that of attorney and client.

On December 29, 1967, the Court of Appeals of New York reversed the order of the Appellate Division and dismissed the petition of the Association, on the dissenting opinion at the Appellate Division (21 N.Y. 2d 694, 287 N.Y.S. 2d 422). Judge Scileppi dissented and voted to affirm on the prevailing opinion at the Appellate Division.

An amended complaint was then on January 22, 1968 filed in this Court in the case at bar.

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The amended complaint no longer sought any injunction against the State Court proceeding because that had terminated favorably to plaintiff.

The amended complaint contained two claims, the first for six million dollars in actual and punitive damages and the second (on the same averments as the first) for an injunction against the Association cooperating with any groups in other jurisdictions to interfere with the plaintiff in the sale of his book or related activities.

The amended complaint avers the acts of the Association in filing its petition with the New York Supreme Court and in obtaining the judgment and order of that Court adjudging plaintiff in contempt for the unlawful practice of law and enjoining him. The amended complaint avers that the Association acted to prevent plaintiff from criticizing lawyers, judges and courts; that the Association acted to prevent sale of the Book because the public might thereby avoid the services of lawyers; that the Association acted with the intent "maliciously" to deprive the plaintiff of his means of expression and to restrict his constitutional right of free speech; that the Association acted "under color of" State law (42 U.S.C. §1983) because of the authority given it by the New York statutes to institute the contempt proceeding; and that the Association and its members "conspired" to restrict the constitutional right of plaintiff to free speech.

This motion was then made, the position of the Association being that the amended complaint is insufficient as a matter of law. This position in turn is based on a submission that the Association, when it institutes a proceeding under Judiciary Law §750 B, has an immunity from suit similar to that of judges and prosecutors,

an immunity most recently sustained by the Supreme Court of the United States in *Pierson* v. *Ray*, 386 U. S. 547 (1967).

II.

Plaintiff bases his action on 42 U.S.C. §1983, which reads as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law suit in equity, or other proper proceeding for redress."

Plaintiff contends that the Association acted under "color" of New York Law because of the provision in Judiciary Law §750 B authorizing a "bar association" to institute the proceeding to punish for a criminal contempt the unlawful practice of law.

Despite the words of Section 1983 making it applicable to "every person", the Supreme Court has held that legislators are immune from suit under the section even for acts done with "an unworthy purpose". *Tenney* v. *Brandhove*, 341 U. S. 367, 377 (1951). Such immunity is not for the "private indulgence" of legislators but for the "public good" in that legislators may discharge their public duties without fear of "the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives" (341 U. S. at

377). The Supreme Court directed dismissal in *Tenney* v. *Brandhove* for failure of the complaint to state a claim upon which relief could be granted.

The Supreme Court in *Pierson* v. *Ray*, above, found that judges were immune from suit under Section 1983 even if alleged to have acted maliciously or corruptly. Again the Court pointed out that the immunity was not given to protect the judge but rather in the public interest so that a judge may decide cases independently and on principle "without fear that unsatisfied litigants may hound him with litigation charging malice or corruption" (386 U. S. at 554).

The same immunity from suit under Section 1983 is given for the same reason to quasi-judicial officials such as prosecuting attorneys and their assistants. *Fanale* v. *Sheehy*, 385 F. 2d 866, 868 (2d Cir. 1967); *Bauers* v. *Heizel*, 361 F. 2d 581 (3d Cir. 1966) cert. denied 386 U. S. 1021 (1967).

In this Circuit it was also held on the same principle that a special assistant to the Attorney General of the United States has absolute immunity from suit for malicious prosecution based on presentation of evidence to a grand jury which returned an indictment, even where the complaint averred personal malice and that as part of a malicious conspiracy the defendant had secured his appointment as a special assistant for the specific purpose of prosecuting plaintiff. *Yaselli* v. *Goff*, 12 F. 2d 396 (2d Cir. 1926), affirmed in per curiam opinion, 275 U. S. 503 (1927). The Court of Appeals stated (12 F. 2d at 404, 406, 407):

> "A United States attorney, if not a judicial officer, is at least a quasi judicial officer, of the government. He exercises important judicial func-

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tions, and is engaged in the enforcement of the law. The reasons for granting immunity to judges, jurors, attorneys, and executive officers of the government apply to a public prosecutor in the performance of the duties which rest upon him. To hold that an attorney of a private client is clothed with absolute privilege, and that a public prosecutor, whose duty it is to enforce the laws of the United States, is not exempt because of what he says and does in the discharge of the duties of his office, is so unreasonable, so contrary to sound public policy, and to the fundamental principles of our jurisprudence, that we cannot accept it.

• • •

"In our opinion the law requires us to hold that a special assistant to the Attorney General of the United States, in the performance of the duties imposed upon him by law, is immune from a civil action for malicious prosecution based on an indictment and prosecution, although it results in a verdict of not guilty rendered by a jury. The immunity is absolute, and is grounded on principles of public policy. The public interest requires that persons occupying such important positions and so closely identified with the judicial departments of the government should speak and act freely and fearlessly in the discharge of their important official functions. They should be no more liable to private suits for what they say and do in the discharge of their duties than are the judges and jurors to say nothing of the witnesses who testify in a case.

• • •

"In our opinion, the reasons which compel us to hold that one who obtains an appointment as a

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> prosecuting officer of the government is immune from civil liability for acts done by him in the discharge of his official duties apply in like manner to protect him against such a charge as that he was governed by improper motives in securing the appointment. The important fact is that he was appointed to the office, and, having been appointed, the public interests require that he shall be free and fearless to act in the discharge of his official duties. If he cannot be charged with acting willfully and maliciously after he gets appointed to the office, no more can he be charged with having conspired to get into the office in order to act willfully and maliciously after he gets his appointment. The one charge is as much to be feared as the other, and is equally derogatory to his public character and usefulness in the office. We are unable to distinguish between the two cases in principle."

A later suit under the civil rights laws came before Judges Learned Hand, Swan and Clark. The defendants were two successive Attorneys General of the United States, two successive directors of the Enemy Alien Control Unit of the Department of Justice and the District Director of Immigration. The complaint alleged that defendants maliciously and from personal ill will and knowing that they were acting unlawfully, deprived plaintiff of his civil rights by keeping him in custody for over four years on the pretext that he was a German enemy alien when they knew him to be French, as the Courts found when he was finally ordered to be freed. The Court of Appeals approved dismissal of the complaint for insufficiency in law because the defendants had absolute immunity from suit. *Gregoira* v. *Biddle*, 177 F. 2d 579 (2d Cir.

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1949), cert. denied, 339 U.S. 949 (1950). Judge Learned Hand had this to say (177 F. 2d at 581):

> "It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties."

The many decisions granting absolute immunity to prosecuting attorneys, clerks of court, curators, and others concerned with the enforcement of the laws or with the judicial function are collected in *Bauers* v. *Heizel*, above cited at 586, footnote 7.

An interesting application, or extension, of the principle is seen in *Byrne* v. *Kyser*, 347 F. 2d 734 (7th Cir. 1965) cert. denied 383 U.S. 913 (1966). Illinois has a procedure for the confinement of those mentally ill. A petition may be filed by "any reputable citizen" averring that a named person is mentally ill; such petition must state the names of witnesses by whom the facts may be proved, at least one of whom must be a physician having knowledge of the facts. Where jury trial is not demanded, the Court must appoint a commission of two physicians to examine the person and to report to the Court. If

found by the commission to be mentally ill, the Court must commit such person. Illinois Revised Statutes, 1967, Chapter 91-½, sections 8-1, 8-7, 8-12 (formerly Ill. Rev. Stat. 1963 and 1961, ch. 91-½ §§ 5-1, 5-5, 5-10). Plaintiff alleged that such a petition was filed against him by Barish, an assistant state's attorney; that Dr. Fein and Dr. Imbiorski were the two physicians appointed by the Court to examine plaintiff and to report; that he was thereafter confined in a mental hospital; that he had never been mentally ill; that Barish, Fein, Imbiorski and other defendants had acted intentionally to deprive him of constitutional rights; and that he had a claim to damages under the civil rights laws, specifically 42 U.S.C. § 1983. The Court found that the two doctors were absolutely immune, saying (347 F. 2d at 736):

> "Drs. Fein and Imbiorski as members of the court-appointed statutory commission share the court's judicial immunity, and in the performance of their quasi-judicial functions are not subject to suit under the sections of the statute here involved."

With respect to Barish the Court said (347 F. 2d at 736):

> ". . . if it be considered that Barish acted in his official capacity as a prosecutor for the state he is afforded the same protection given a judge."

It is clear that, on principle, none of the State judges who decided against plaintiff Dacey could be sued by him under the civil rights laws. It is also clear that if a prosecuting attorney had instituted the proceedings, he also would be absolutely immune from such a suit.

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The question here is whether a different result is indicated because the proceedings were instituted, as authorized in the statute, by a "bar association".

III.

The State of New York has a strong public policy against the practice of law in the State by any person "unless he has been regularly admitted to practice, as an attorney or counsellor in the courts of record in the state" (Judiciary Law § 484).

The unauthorized practice of law in New York is a misdemeanor, a criminal offense (Judiciary Law § 485). The object of the statute making it an offense to engage in the unauthorized practice of law is "to protect our citizens against the dangers of legal representation and advice given by persons not trained, examined and licensed for such work . . .". *Spivak* v. *Sacho*, 16 N. Y. 2d 163, 168, 263 N. Y. S. 2d 953, 956 (1965). It had earlier been said by the highest Court in New York: "Protection of the members of the lay public of our State, when they seek *legal advice* . . . is the basis of the requirements of licensing of attorneys by the State . . .". *In re Roel*, 3 N. Y. 2d 224, 231; 165 N. Y. S. 2d 31, 37 (1957), appeal dismissed 355 U. S. 604 (1958). Still earlier, the highest Court in New York had declared (*People* v. *Alfani*, 227 N. Y. 334, 339 (1919)):

> "The reason why preparatory study, educational qualifications, experience, examination and license by the courts are required, is not to protect the bar as stated in the opinion below but to protect the public. Similar preparation and license are now demanded for the practice of medicine, surgery,

dentistry and other callings, and the list is constantly increasing as the danger to the citizen becomes manifest and knowledge reveals how it may be avoided.

"Why have we in this state such strict requirements for admission to the Bar? A regents' certificate or college degree followed by three years in a law school or an equivalent study in a law office marks the course to a bar examination which must finally be passed to entitle the applicant to practice as an attorney. Recognizing that knowledge and ability alone are insufficient for the standards of the profession, a character committee also investigates and reports upon the honesty and integrity of the man. And all of this with but one purpose in view and that to protect the public from ignorance, inexperience and unscrupulousness."

The Supreme Court of New York has been given power, not only over licensed attorneys, but over "all persons . . . assuming to practice law" (Judiciary Law § 90(2)).

The statutory prohibition against the unauthorized practice of law can be enforced in New York in three ways: first, by a criminal prosecution; second, by a civil action under Judiciary Law § 476-a; and third (that employed against plaintiff Dacey), by summary proceedings under Judiciary Law § 750 B to punish for criminal contempt. It has been held that a civil action is appropriate "where disputed issues of fact require a trial" but that "where the facts are undisputed, a summary proceeding may be simpler, more expeditious and more appropriate than either a criminal prosecution or civil action." *Application*

of New York County Lawyers Ass'n (In re Bercu), 273 App. Div. 524; 78 N. Y. S. 2d 209, 212, 213 (1st Dept. 1948), affirmed 299 N. Y. 728, 87 N. E. 2d 451 (1949). Since the facts in the case involving Dacey were undisputed, the Association proceeded properly in instituting a summary proceeding.

In the First Department, where the proceedings against Dacey were instituted, it is contemplated by the Appellate Division that bar associations, and specifically this defendant Association, will be active in investigating the unauthorized practice of law and, where deemed appropriate, instituting proceedings to stop such practice. A Rule (XII-A) of the Appellate Division, First Department, provides that as to three named bar associations, including this defendant Association, subpoenas shall issue on their application for a preliminary investigation of any person believed to be "unlawfully practicing or assuming to practice law"; that the evidence of witnesses at such investigation may be transcribed; and that such witnesses may be sworn. This Rule has recently been sustained as proper. *Matter of A'Hearn* v. *Committee, etc. of the New York County Lawyers Ass'n.*, 55 Misc. 2d 540, 285 N. Y. S. 2d 744 (Sup. Ct. N. Y. Cty. 1967), affirmed 30 App. Div. 2d 47, —— N. Y. S. 2d —— (3d Dept. 1968), appeal pending in the Court of Appeals.

It thus appears that the Association when it acts under Judiciary Law § 750 B is a part of the judicial process of New York. The situation at bar seems exactly the same as that of a bar association sued for damages for its activities under Court Rule which led to the disbarment of a lawyer. This happened in the State of Washington. The lawyer then sued the bar association under the civil rights laws, 42 U. S. C. § 1983. The association was held to have absolute immunity (*Clark* v. *State of*

Washington, 366 F. 2d 678 (9th Cir. 1966)), the Court saying (at 681):

> "As an arm of the Washington Supreme Court in connection with disciplinary proceedings, the Bar Association is an 'integral part of the judicial process' and is therefore entitled to the same immunity which is afforded to prosecuting attorneys in that state."

I am unable to distinguish the situation in *Clark* from that at bar.

The defendant Association has instituted at least two proceedings under Judiciary Law § 750 B which have resulted in final judgments enjoining in specific instances the unauthorized practice of law. *Matter of New York County Lawyers Ass'n (In re Bercu,)* above; *In re Roel,* above.

It thus appears to be clearly in the public interest that the Association be able to determine, independently and fearlessly, when to institute summary contempt proceedings to stop what it believes to be the unauthorized practice of law. Indeed, it was in the public interest that the Association instituted such proceedings against plaintiff Dacey. True this plaintiff there prevailed but the question was obviously a close one and it is in the public interest that such questions be finally decided, whatever be the decision.

Since fear of lawsuits for damages would seriously hamper the Association in making determinations whether or not to institute proceedings to stop what is believed to be the unauthorized practice of law, there is every reason to find that on principle the Association is immune from such suits as that at bar.

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Opinion of Wyatt, D. J. dated October 9, 1968

IV.

If (contrary to my view) the Association does not have an absolute immunity from suit, it must at least have the same immunity as a peace officer, an immunity described by the Supreme Court of the United States as follows (*Pierson* v. *Ray*, above, at 555):

> "Under the prevailing view in this country a peace officer who arrests someone with probable cause is not liable for false arrest simply because the innocence of the suspect is later proved."

The judgment against plaintiff by Mr. Justice Marks affirmed by vote of four justices of the Appellate Division seems conclusive evidence of the existence of probable cause for institution of the proceeding by the Association, despite later reversal of the judgment. Our Court of Appeals has so declared (*Salvage Process Corp.* v. *Acme Tank etc.*, 104 F. 2d 105, 107 (1939):

> "The granting of a final injunction, despite reversal on appeal, is conclusive evidence of probable cause."

V.

Aside from the first claim for money damages, there is a second claim for an injunction against cooperation by the Association with groups in other jurisdictions to obtain relief similar to that sought in New York. This claim must fail for the reason that there are no averments that the Association is in any way threatening any such action.

The motion is granted and the Clerk is directed to enter judgment dismissing the action for failure of the amended

complaint to state a claim upon which relief can be granted.

So Ordered.

Dated: New York, New York
October 9, 1968

Inzer B. Wyatt
United States District Judge

Amendment Dated October 11, 1968 to Opinion

Norman F. Dacey and Norman F. Dacey doing business as National Estate Planning Council, Plaintiff,

-v-

New York County Lawyers' Association, Defendant.

67 Civ. 3021

The second sentence of the second paragraph on page 2 in part I of the opinion and order filed October 9, 1968, is amended to read as follows:

> "The members of the Association are lawyers practicing in New York County; there are many such members and it is believed to be the largest local bar association in the United States."

So Ordered.

Dated: October 11, 1968

Inzer B. Wyatt
United States District Judge

Judgment of the United States Court of Appeals

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

67 Civil 3021

NORMAN F. DACEY and NORMAN F. DACEY doing business as NATIONAL ESTATE PLANNING COUNCIL,

Plaintiff,

against

NEW YORK COUNTY LAWYERS' ASSOCIATION,

Defendant.

The defendant having moved pursuant to Rule 12(B)(6) of the Federal Rules of Civil Procedure to dismiss the action on the ground that the amended complaint fails to state a claim upon which relief can be granted, and the said motion having come on to be heard before the Honorable Inzer B. Wyatt, United States District Judge, and the Court thereafter on October 9, 1968, having handed down its opinion granting the motion, it is

ORDERED, ADJUDGED and DECREED: That the defendant New York County Lawyers' Association have judgment against the plaintiffs Norman F. Dacey and Norman F. Dacey doing business as National Estate Planning Council, dismissing the action on the ground that the amended complaint fails to state a claim upon which relief can be granted.

Dated: New York, N. Y.
October 10, 1968

John J. Olear, Jr.
Clerk

Memorandum Decision-Opinion

of the Court of Appeals

21 N.Y.2d 694

In the Matter of the Petition of NEW YORK COUNTY LAWYERS' ASSOCIATION, Respondent, v. Norman F. DACEY, et al., Appellants.

Court of Appeals of New York.

Dec. 29, 1967.

Appeal from Supreme Court, Appellate Division, First Department, 28 A.D.2d 161, 283 N.Y.S.2d 984.

Proceeding was brought by New York County Lawyers' Association against author of book entitled "How to Avoid Probate!", and the publishers, distributors, and sellers of the book pursuant to the Judiciary Law, Consol.Laws, c. 30, § 750, subd. B, to punish them for contempt and for an injunction for the unlawful practice of law.

The Supreme Court, Special Term, New York County, 54 Misc.2d 564, 282 N.Y.S.2d 985, entered a judgment adjudging the author guilty of criminal contempt because of the allegedly unlawful practice of law, fining him, and granting an injunction against him and the publishers, distributors, and sellers of the book.

The Appellate Division, 28 A.D.2d 161, 283 N.Y.S.2d 984, by a divided court, entered an order November 15, 1967 which affirmed the judgment as to the author and modified the judgment, on the law, as to the publishers, distributors, and sellers by limiting injunction granted against the publishers, distributors and sellers so as to restrain from the publication, distribution and sale in New York, and from advertising or soliciting purchases of the book in New York. Stevens, J., dissented, on ground that it could not be claimed that the publication of a legal text which purported to say what the law is amounts to legal practice, and that the mere fact that the principles or rules stated in the text may be accepted by a particular reader as a solution to his problem, does not affect the matter, and that the publication of a multitude of forms for all manner of legal situations is a commonplace activity and their use by the Bar and public is general, and that the conjoining of the text and the forms with advice as to how the forms should be filled out does not constitute the unlawful practice of law, and that the order appealed from should be vacated on the law and the petition should be dismissed.

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The author, publishers, distributors and sellers appealed to the Court of Appeals.

Daniel M. Shientag, New York City, for petitioner respondent.

Arthur Stephen Penn, New York City, for respondents-appellants, Norman F. Dacey and Norman F. Dacey doing business as National Estate Planning Council.

Satterlee, Warfield & Stephens, New York City, for respondents-appellants, Crown Publishers, Inc., Doubleday & Company, Inc. and Brentano's Inc.

Order reversed and the petition dismissed with costs on the dissenting opinion at the Appellate Division.

All concur, except SCILEPPI, J., who dissents and votes to affirm on the prevailing opinion at the Appellate Division.

Opinion of Appellate Division

SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT, SEPTEMBER 1967

HAROLD A. STEVENS, J.P.,
SAMUEL W. EAGER,
LOUIS J. CAPOZZOLI,
GEORGE TILZER,
JAMES B. M. MCNALLY, J.J.

IN THE MATTER OF THE
PETITION OF

NEW YORK COUNTY LAWYERS' ASSOCIATION,

Petitioner-Respondent,

—against—

NORMAN F. DACEY, NORMAN F. DACEY doing business as NATIONAL ESTATE PLANNING COUNCIL, CROWN PUBLISHERS INC., DOUBLEDAY & CO., INC. and BRENTANO'S INC.,

Respondents-Appellants,

for a decree pursuant to Section 750B of the Judiciary Law adjudging the respondents guilty of a criminal contempt of Court, an injunction and other relief.

Appeal from judgment of the Supreme Court at Special Term (Marks, J.), entered September 12, 1967, in New York County, which held appellant Dacey in contempt and issued a broad injunction against all appellants.

* * * *

Dissenting Opinion

STEVENS, J. (Dissenting):

I dissent, vote to reverse and dismiss the petition.

This is an appeal from an order and decree entered September 12, 1967 adjudging appellants Norman F. Dacey and Norman F. Dacey doing business as National Estate Planning Council, guilty of criminal contempt of court by reason of the unauthorized practice of the law. Dacey was fined $250 and upon default in payment was to be committed for thirty days. Special Term also found appellants Crown Publishers' Inc., Doubleday & Co., Inc. and Brentano's, Inc. were likewise engaged in the unauthorized practice of law. They, however, were not held in criminal contempt. All were enjoined from continuation of certain acts as set forth in the order and decree.

In 1965 Norman F. Dacey (Dacey) drafted and prepared a series of forms of various instruments consisting of *inter vivos* trust, wills and related documents. These forms were incorporated into a book entitled "How To Avoid Probate" which Dacey copyrighted under the name Norman F. Dacey doing business as National Estate Planning Council, a trade name. The book itself consists of approximately 55 pages of text and approximately 310 pages of forms. The petitioner, the New York County Lawyers' Association, brought a proceeding under Section 750(B) of the Judiciary Law to enjoin publication of the book. That section so far as pertinent provides "[T]he Supreme Court has power under this section to punish for a criminal contempt any person who unlawfully practices or assumes to practice law, and a proceeding under this subdivision may be instituted on the court's own motion or on the motion of any officer charged with the duty of investigating or prosecuting unlawful practice of law, or by any bar associa-

tion incorporated under the laws of this state." Therefore the petitioner is clearly entitled to bring the proceeding. Dacey, a Connecticut resident, was served in Connecticut under CPLR 302, our long arm statute, on the theory that he allegedly committed tortious acts in New York in writing and causing the book to be published and advertised in New York. It might be noted at this point that Dacey had previously been enjoined in Connecticut (see *Grievance Committee of the Bar of Fairfield County* v. *Norman F. Dacey, et al.*, 154 Conn. 129, 222 A. 2d 339, appeal dismissed sub nom. *Dacey* v. *Grievance Committee*, 387 U. S. 938). That injunction was the outgrowth of a 30-page booklet written by Dacey describing a so-called "Dacey Trust", the first six pages of which contained general information about the history and uses of the *inter vivos* and testamentary trusts and tax information. The balance of the booklet was a description of the Dacey trust and its claimed advantages. The booklet was supplied to prospective customers who met with Dacey and whom he advised and supervised in the filling of the blanks in the forms, and in some instances Dacey supplied forms which varied somewhat from those in the book.

Here the claim of unauthorized practice of law rests upon the writing and publication of this book of which some 600,000 copies have been sold. Petitioner complains also of the advertising which appears on the jacket of the book. The advertising in question refers to Dacey as one of America's leading professional estate planners. The book, as the title indicates, attempts to inform the purchaser how to avoid probate.

Petitioner asserts that by the appellants' representations to the public they were selling legal advice and they were representing that Dacey was an expert qualified and competent to give such legal advice. Petitioner alleges the

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scheme and plan created by Dacey, and carried into effect by Crown Publishers, Inc., who published the book, and Doubleday & Co., Inc. and Brentano's, Inc., who sold and distributed the book, constitute the unauthorized practice of law; that Crown, Doubleday and Brentano's are equally responsible because they have been engaged in aiding and abetting the unauthorized practice of law and that an injunction may issue under 750(B) of the Judiciary Law, which section they assert is clear and unambiguous.

Dacey contends that his acts cannot, as a matter of law, constitute the unauthorized practice of law in the absence of proof of the giving of specific advice to a specific individual about his particular problems; that the publication and distribution of a book containing forms is not the equivalent of giving specific advice to specific individuals about their particular problems, and does not constitute the unauthorized practice of law.

The defendants urge several defenses based on contentions that Section 750(B) violates different articles of the federal constitution. In the view taken it is not necessary to consider these contentions, and attention is directed only to the question of whether the publication of this book constitutes practice of the law within the meaning of the section.

Stripped of the arguments and the contentions of the various parties, the question may be briefly and baldly expressed: Does the writing, publication, advertising, sale and distribution of "How to Avoid Probate" constitute the unauthorized practice of law within the meaning of Section 750(B)? It cannot be claimed that the publication of a legal text which purports to say what the law is amounts to legal practice. And the mere fact that the principles or rules

stated in the text may be accepted by a particular reader as a solution to his problem, does not affect this. Courts and lawyers continuously use and cite texts for this very purpose. So also with forms. The publication of a multitude of forms for all manner of legal situations is a commonplace activity and their use by the bar and the public is general. In fact, many statutes and court rules contain the forms to be used in connection with them. Apparently it is urged that the conjoining of these two, that is, the text and the forms, with advice as to how the forms should be filled out, constitutes the unlawful practice of law. But that is the situation with many approved and accepted texts.

Dacey's book is sold to the public at large. There is no personal contact or relationship with a particular individual. Nor does there exist that relation of confidence and trust so necessary to the status of attorney and client. This is the essential of legal practice—the representation and the advising of a particular person in a particular situation. The lectures of a law school professor are not legal practice for the very reason that the principles enunciated or the procedures advised do not refer to any activity in immediate contemplation though they are intended and conceived to direct the activities of the students in situations which may arise. Moreover, there is no claim here as there was in the Connecticut proceeding (*Grievance Committee of Fairfield County* v. *Dacey*, 154 Conn. 129, 222 A. 2d 339, app. dismissed sub nom. *Dacey* v. *Grievance Committee*, 387 U. S. 938) that Dacey, in effect, prepared instruments tailored to the particular needs of his customers.

Special Term referred to and placed a measure of reliance on the determination of the Connecticut court in making its own determination. In the Connecticut proceeding

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against Dacey it was determined that in addition to the preparation of a thirty-page booklet Dacey prepared trusts and wills adapted to clients' needs providing, at the same time, for large potential profits to himself in the sale of Wellington Fund shares on which he received a 6% commission. The court declared, when Dacey "prepared wills and trusts for his customers and advised, as to the desirability in their circumstances, of the specific wills or trusts so prepared for them" he engaged in the illegal practice of law. Certainly that case may readily be distinguished.

At most the book assumes to offer general advice on common problems, and does not purport to give personal advice on a specific problem peculiar to a designated or readily identified person.

"How to Avoid Probate" may be purchased by anyone willing to pay the purchase price. One is free to purchase or not as he wills. There is no personal reliance upon the selection and judgment of Dacey in the discretionary choice of a form adapted to the customer's needs.

It is recognized that rules for the admission of persons to the practice of law, and rules or canons regulating their conduct thereafter, are "to protect the public from ignorance, inexperience and unscrupulouness" (*People* v. *Alfani*, 227 N. Y. 334, 339). In this way, hopefully, the unqualified are excluded. The prohibition against the unauthorized practice of law has a like objective. "How to Avoid Probate" has been published and freely sold for more than one year. There is no showing in this record that this book has exploited the public or led its members astray improperly or incorrectly. In fact there is no factual evidence submitted as to the effect of the publication and sale of the book. In order to sustain petitioner's position one has to con-

clude that the book by its very nature comprises the unauthorized practice of law. "How to Avoid Probate" is, in one sense, a do-it-yourself kit. To that extent it could encroach upon the preserves of lawyers, though the present record does not give evidence of that fact. Every individual has a right to represent himself if he chooses to do so, and to assume the risks attendant upon what could prove a precarious undertaking. Those of sufficient substance to require trusts or wills for the most part are persons of some common sense and, normally, would hardly be expected to rely completely and unquestioningly upon a mass-printed form, even with accompanying instructions. However, they have a right to do so.

This book was printed prior to February 1966 by a Denver, Colorado printer and sold over 10,000 copies. We are told that to date it has sold over 600,000 copies. There would hardly be dispute that book printing and sale per se is not the practice of law. Similarly, the printing and sale of forms, including those subject to the injunction, would not per se constitute the practice of law. What then distinguishes "How to Avoid Probate" so as to bring it within the prohibition? With reference to the advertising and the representations which appear on the covers of the book, if such advertising be false or fraudulent the Penal Law affords a remedy (Revised Penal Law §190.20, formerly Penal Law §421 et seq.). Of course, the fact that an act might be a violation of Penal Law would not necessarily exclude it from consideration as a component part of an act otherwise not criminal.

Concededly the practice of law "manifestly includes the drafting of many documents which create legal rights. It does not follow, however, that the drafting of all such docu-

ments is always the practice of law" (*Oregon State Bar* v. *Security Escrows, Inc.*, 377 P. 2d 334, 337). "The practice of law is not confined to court work. It embraces the preparations of pleadings and other papers incident to actions and special proceedings and the management of such actions and proceedings on behalf of clients before judges and courts, and in addition, to conveyancing, the preparation of legal instruments of all kinds, the giving of advice to clients, and in general all action taken by them in matters connected with the law" (3 N. Y. Jur., Attorney and Client, §1; *People* v. *Alfani*, 227 N. Y. 334). In all the cases where there was a holding of unlawful practice of law there was some employment, express or implied, resulting either from contract, designation or assignment. (See, *People* v. *Alfani, supra*). It would seem logical that for one to be guilty of the unauthorized practice of law he must improperly or illegally have created or assumed such a relationship. That is not the situation before us.

The First and Fourteenth Amendments to the Constitution of the United States, and Article 1, §8 of the Constitution of the State of New York refer to and deal with the right of freedom of speech and of the press (*Grosjean* v. *American Press Co.*, 297 U. S. 233; *Near* v. *Minnesota*, 283 U. S. 697, see also 4 Blackstone, Commentaries, 11th ed. (1791) 150-152).

With respect to the publisher and distributors, the order appealed from restrains them from practicing law or holding themselves out to be qualified to practice law. It also imposes specific restraints with respect to any "forms", writings or documents. Nowhere in the order is the book "How to Avoid Probate" mentioned. The order imposes prior restraints, and imposes also an obligation of examination and determination with respect to printing and dis-

tribution of material which, reasonably, cannot be met. There is no precise definition or even clear indication of what material falls within the prohibited category. The publisher and distributors act at their peril in determining what does or does not contravene the terms of the order. They are, in effect, saddled with a foreknowledge of and responsibility for the contents of every book published or distributed by them. If the advertisements are false and misleading laws are available to punish and prevent their continuance. Certainly, no clear and present danger of public corruption or public misleading is shown to exist. The line between what may be characterized as "puffing" and intentional misleading is sometimes difficult to distinguish. But on this record I would vacate the order in its entirety as to the publishers (*cf. Smith* v. *California*, 361 U. S. 147; *New York Times* v. *Sullivan*, 376 U. S. 254).

Dacey's criticism of what he considers the high cost of probate is a right of speech to which he is entitled. Of course if the exercise of Dacey's right to freedom of speech by this publication violates reasonable standards erected for the protection of society, or of important interests of society, his right could be subordinated for the common good and the protection of the whole. In my view this book may not be so considered. The dangerous tendency or clear and present danger doctrines (see, *Gitlow* v. *New York*, 268 U. S. 652; *Whitney* v. *California*, 274 U. S. 357; *Herndon* v. *Lowry*, 301 U. S. 242; *Terminello* v. *Chicago*, 337 U. S. 1) are not here applicable. The book is not of the kind or quality to provoke disorder or incite one to public disturbance. In fact there is no substantive evil imminently threatening the public.

That it is not palatable to a segment of society which conceives it as an enroachment of their special rights hardly

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justifies banning the book. "[I]t is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions" (*Bridges* v. *California*, 314 U. S. 252, 270). Free and open discussion or even controversy could lead to reforms, if needed, or improvement where desirable. Books purporting to give advice on the law, and books critical of law and legal institutions have been and doubtless will continue to be published. Legal forms are available for purchase at many legal stationery stores. Unless we are to extend a rule of suppression beyond the obscene, the libelous, utterances of or tending to incitement, and matters similarly characterized, there is no warrant for the action here taken.

The order appealed from should be vacated on the law and the petition dismissed, without costs.

FILED
FEB 27 1968
CLERK'S OFFICE

Court of Appeals

State of New York, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 29th day of December in the year of our Lord one thousand nine hundred and sixty-seven, before the Judges of said Court.

WITNESS,

The HON. STANLEY H. FULD,
Chief Judge, *Presiding.*

RAYMOND J. CANNON, *Clerk.*

REMITTITUR December 29, 19 67

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No. 582. 67

In the Matter of
the Petition of New York County
Lawyers' Association,
Respondent,
vs.
Norman F. Dacey, & ors., &c.,
Appellants.
For a decree &c.

Be it Remembered, That on the 30th day of November in the year of our Lord one thousand nine hundred and sixty-seven, Norman F. Dacey, & ors., &c., the appellants in this cause, came here unto the Court of Appeals, by Arthur Stephen Penn, & ors., their attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And New York County Lawyers' Association, the respondent - in said cause, afterwards appeared in said Court of Appeals by Daniel M. Shientag, its attorney.

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Whereupon, The said Court of Appeals having heard this cause argued by Mr. Arthur Stephen Penn, of counsel for the appellants Dacey, and by Mr. James F. Dwyer, of counsel for the appellants Crown, & ors., and by Mr. Daniel M. Shientag, of counsel for the respondent -, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is reversed and the petition dismissed, with costs, on the dissenting opinion at the Appellate Division.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be

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Therefore, it is considered that the said order be reversed &c., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

Raymond J. Cannon

Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office,
Albany, December 29, 19 67.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

Raymond J. Cannon

Clerk.

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MAY 8 1970

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1406

NORMAN F. DACEY & NORMAN F. DACEY, doing business as NATIONAL ESTATE PLANNING COUNCIL,
Petitioners,

v.

NEW YORK COUNTY LAWYERS' ASSOCIATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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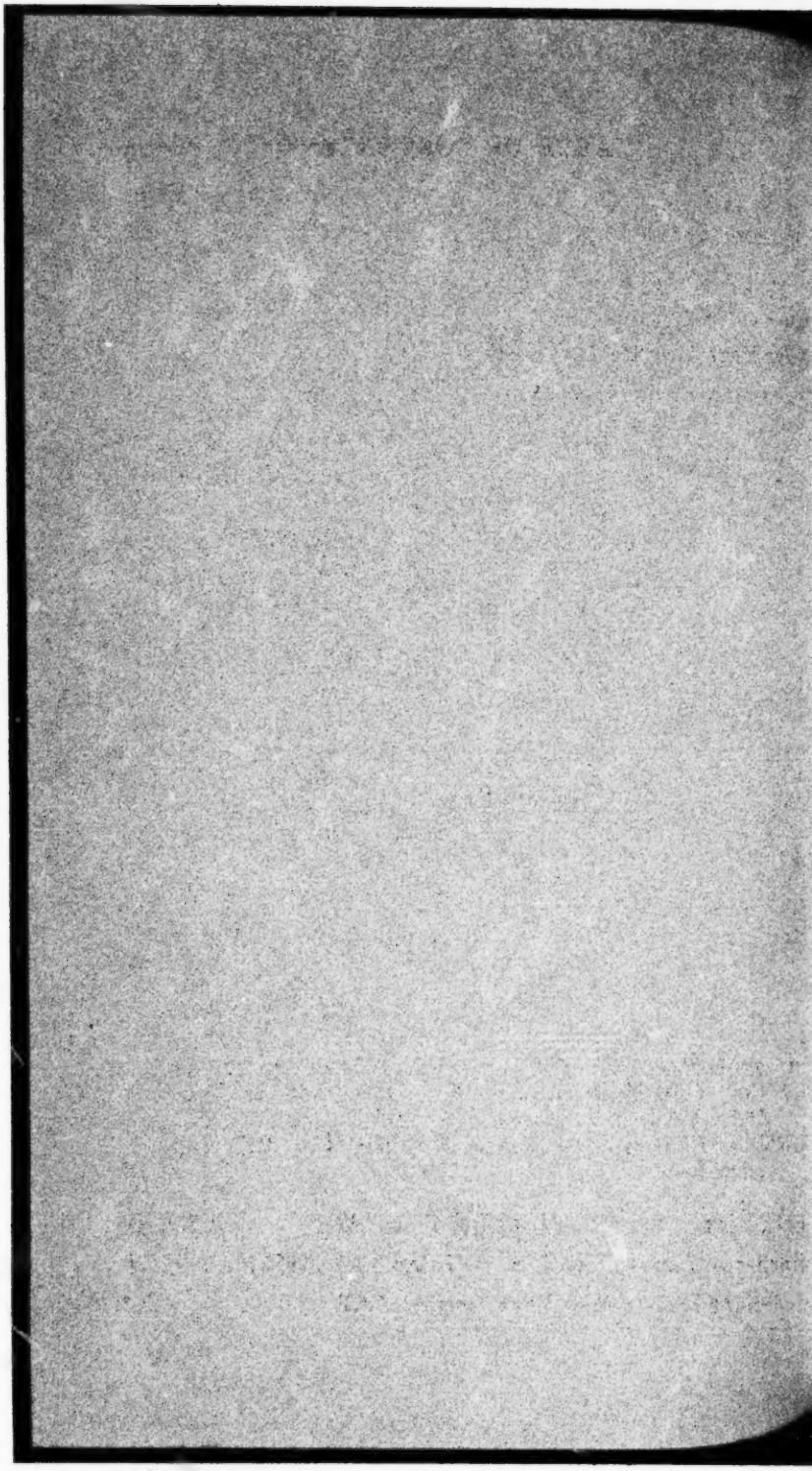

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1406

NORMAN F. DACEY & NORMAN F. DACEY, doing business as NATIONAL ESTATE PLANNING COUNCIL,
Petitioners,

v.

NEW YORK COUNTY LAWYERS' ASSOCIATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit (App. A to Petition) is not yet reported. The opinion of the United States District Court for the Southern District of New York (A28-44) is reported at 290 F. Supp. 835.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Pursuant to a state statute authorizing a bar association to institute a criminal contempt proceeding to punish any person who unlawfully practices or assumes to practice law, respondent bar association initiated such a proceeding against petitioner. The proceeding focused on a book by petitioner which, apart from a brief criticism of the probate court system and trust and estate lawyers, consisted primarily of estate-planning legal instruments for suggested use by the reader. The state trial court found petitioner guilty of unauthorized practice and an intermediate appellate court affirmed. The highest state court reversed.

1. May petitioner recover damages from respondent in a suit under the Civil Rights Act of 1871, 42 U.S.C. § 1983, for its prosecutorial role in initiating the contempt proceedings, or is such a suit barred by immunity in respondent or by the existence of probable cause for respondent's action?

NEW YORK STATUTE INVOLVED

In addition to the constitutional and statutory provisions set forth in the Petition, Section 750B of the Judiciary Law of New York, pursuant to which respondent initiated the contempt proceedings provides:

> "In addition to the power to punish for a criminal contempt as set forth in subdivision A, the supreme court has power under this section to punish for a criminal contempt any person who

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unlawfully practices or assumes to practice law; and a proceeding under this subdivision may be instituted on the court's own motion or on the motion of any officer charged with the duty of investigating or prosecuting unlawful practice of law, or by any bar association incorporated under the laws of this state."

STATEMENT OF THE CASE

The petition in this case seeks reversal of lower court decisions that the nonlawyer author of a book on estate planning cannot recover damages from a bar association that, with the specific authority of state law, initiated criminal contempt proceedings to determine whether the author was guilty of the unauthorized practice of law. In that proceeding, the state trial court and intermediate appellate court held that the author was illegally practicing law; the highest state court ultimately reversed.

Petitioner Norman F. Dacey is a self-styled "professional estate planner." For a while, "he engaged in giving legal advice to clients with respect to wills, and other estate matters" in Connecticut. (A12) The Connecticut courts enjoined these activities. Mr. Dacey then published a book entitled "How To Avoid Probate!" (A29), which became a best seller. The book consisted of a few pages criticizing the probate court system, and many pages providing legal instruments such as trusts and wills, with instruction encouraging the reader to plan his own estate, without consulting a lawyer. (A13)

Respondent is a non-profit membership corporation, comprised of lawyers practicing in New York County. It has been the principal agency in New York for protecting the public against unauthorized practice of law.

The express authority given to it, and like bar associations, by the New York Judiciary Law to initiate the proceedings against unauthorized practice of law is supplemented by court rules conferring the additional power to issue process to compel attendance of witnesses. Virtually every proceeding commenced to protect the public in this area has been brought by the respondent, including proceedings to determine whether various kinds of activities constitute the unauthorized practice of law, such as legal advice by foreign lawyers, certified public accountants and others.

After an investigation, in January 1967 the bar association initiated a criminal contempt proceeding under the specific authority of Section 750B of the New York Judiciary Law to adjudge Mr. Dacey guilty of unauthorized practice of law and to enjoin those of his activities which it claimed constituted such practice. Mr. Dacey was not arrested and no preliminary relief was sought or granted.

The New York Supreme Court found Mr. Dacey guilty, fined him $250, and granted an injunction. The bar association did not enforce this order pending appeal, so no restraint was placed on Mr. Dacey's activities. (A14) While pursuing an appeal in the state courts, Mr. Dacey brought this suit in the District Court for the Southern District of New York to enjoin the state proceedings. The District Court refused to grant a preliminary injunction because Mr. Dacey made no showing of irreparable injury, failed to demonstrate a strong probability of success on the merits, and showed no reason why he could not raise his constitutional objections in the state court proceedings. (A16)

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In the state proceedings, the New York Appellate Division affirmed the judgment of the trial court by a 4 to 1 vote. The bar association continued to refrain from enforcing the injunction, which by its terms would have restrained Mr. Dacey from distributing his book within the state and from holding himself out as qualified to give legal advice on estate planning, but which also specifically provided that Mr. Dacey was not prohibited from expressing any opinion with regard to any law, procedure or legal institution. (A14) Finally, the New York Court of Appeals, with one dissent, reversed and dismissed the proceeding against Mr. Dacey. 21 N.Y. 2d 694, 287 N.Y.S. 2d 422 (1967).

Obviously heartened by this success in the state proceeding, Mr. Dacey pursued his federal suit with renewed vigor. He amended his complaint to assert a claim for $1.5 million compensatory and $4.5 million punitive damages, although the bar association of course had never attempted to enforce the state court injunction. The amended complaint pleads that the bar association sought to interfere with Mr. Dacey's right of free expression, but sets forth as the sole activity complained of the bar association's commencement of the contempt proceeding authorized by state law.

The District Court dismissed the complaint on the alternative grounds that (1) the bar association, like a public prosecutor, functioned as an officer of the court in initiating the proceeding, and therefore under the reasoning of *Pierson* v. *Ray,* 386 U.S. 547 (1967), enjoyed an absolute immunity from suit under 42 U.S.C. § 1983, or (2) the association, if not absolutely immune, was at the very least entitled to a limited

analogous to that available to a peace officer for an arrest made on the basis of probable cause.

The Court of Appeals affirmed. A majority of two judges felt that on a balancing of interests the bar association should not be granted the absolute immunity available to judges and prosecutors. But all three judges agreed with the District Court judge that the bar association could assert the defense of probable cause and that the final injunction granted by the state trial court (and affirmed by the intermediate state appellate court) provided conclusive evidence that the bar association had had probable cause to believe Mr. Dacey was guilty of the unauthorized practice of law, and to initiate the contempt proceeding authorized by state law.

ARGUMENT

The decision below that no claim lies against the bar association because it had probable cause to initiate the state proceeding complained of was plainly correct. Mr. Dacey's argument that the probable-cause defense should not be available under Section 1983 was rejected by this Court only a few years ago. There is no reason to reconsider *Pierson* v. *Ray*, 386 U.S. 547 (1967), which was unanimous on that point. That is particularly true with regard to this case involving the institution of a judicial proceeding specifically authorized by a state statute. There was no arrest or imprisonment. The bar association did not even attempt to enforce the final injunction granted by the state trial court.

The question of what may constitute probable cause has been long established at common law. As all judges below agreed without difficulty, the entry of a final judgment against the petitioner in the state

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court proceeding and its affirmance by an appellate court was conclusive evidence in law and in common sense of the existence of probable cause for the initiation of the proceeding, notwithstanding subsequent reversal. This is a settled principle on which petitioner shows no conflict among the authorities. The probable cause conclusion was further buttressed by the Connecticut court proceedings and the District Court's refusal to grant a preliminary injunction in this case.*

I. The Recognition Below of the Defense of Probable Cause Was Plainly Correct

Mr. Dacey's brief in the Court of Appeals conceded that the defense of "probable cause is available to a defendant" (p. 15). Now, however, he argues that "if the traditional defense of probable cause is made available in actions brought pursuant to the Civil Rights Act," alleged wrongdoing will go unpunished. This Court made clear in its 1967 decision in *Pierson* v. *Ray*, 386 U.S. 547 (1967), that the Civil Rights Act did not change common-law rules concerning the immunity of public officials or available defenses. The Court specifically held that the defense of probable cause, "which the Court of Appeals found available to the officers in the common-law action for false arrest and imprisonment, is also available to them in the action under §1983." *Id.* at 557.

The courts below correctly concluded that the strong public interest in protecting against unauthorized prac-

* Review of the dismissal would require consideration of the further issue of respondent's absolute immunity for its action as part of the judicial process which respondent urged below and would be entitled to continue to urge. See *Langnes* v. *Green*, 282 U.S. 531, 537-38 (1931); *Morley Constr. Co.* v. *Maryland Casualty Co.*, 300 U.S. 185, 191-92 (1937).

tice of law requires that respondent have immunity if there was probable cause. Any other rule would prevent vigorous enforcement of desirable laws. Excessive timidity in law enforcement would limit prosecutions to cases where the violation was clear beyond all doubt, and thereby prevent the clarification of the law which only litigation of close questions can provide.

In urging that the traditional defense of probable cause should not apply where the alleged wrong derives from a criminal proceeding, petitioner overlooks the fact that these rules developed in the law of malicious prosecution which related to criminal proceedings only. *E.g.*, HARPER & JAMES, THE LAW OF TORTS § 4.1 (1956).

That leaves only the question of what constitutes probable cause—which is neither novel nor uncertain. In accord with common-law principles and the precedent of this Court, the courts below properly held that the final judgment of the state trial court conclusively established probable cause. *Crescent City Live Stock Co.* v. *Butchers' Union Slaughter House Co.*, 120 U.S. 141 (1887); *see also Salvage Process Corp.* v. *Acme Tank Cleaning Process Corp.*, 104 F. 2d 105 (2d Cir.), *cert. denied*, 308 U.S. 599 (1939). This is a rule well rooted in fairness and logic.

Moreover, the forceful further indicia of probable cause in this case make it an inappropriate one for this Court to reconsider the rule of *Crescent City Live Stock Co.* if it were otherwise so inclined. Regardless of whether success at the trial court level should conclusively demonstrate probable cause, an affirmance by an appellate court certainly should. Moreover, the allegations of Mr. Dacey's own complaint demonstrate that his activities presented a fair question of

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unauthorized practice. As the amended complaint stated, the book sets forth "ways and means" of avoiding lawyers and probate and "contains various forms and explanatory material dealing with decedent's estates and lifetime trusts" (A18). The complaint also alleges that the bar association was attempting to prevent Mr. Dacey from competing with its members in "advising the public as to the nature and means of the probate law and courts and tools and devices available to the public to avoid or properly use the probate law and probate courts" (A24). The petitioner cannot consistently accuse the bar association of exclusionary tactics and at the same time argue that there was not even probable cause to believe he was intruding into its territory, the practice of law.

In addition petitioner had previously engaged in "giving legal advice to clients" on estate matters in Connecticut which caused the Connecticut courts to enjoin him. And on his injunction application in the District Court, though given ample opportunity, he was unable to convince the District Court that there was no probable cause for the state proceedings. These matters alone would warrant dismissal of petitioner's claim on the ground of probable cause without any need to reach the question of the effect of the actual conviction and the affirmance. *E.g., Burt* v. *Smith,* 181 N.Y. 1, 73 N.E. 495 ( ), *appeal dismissed,* 203 U.S. 129 (1906).

Petitioner's reliance on *Pierson* v. *Ray* to justify reexamination of the existence of probable cause is misplaced. The key factor in that case with respect to all defendants other than the judge (i.e., the arresting officers), was that they had imposed actual restraint on plaintiffs by arrest and had done so *ex parte*

before any judicial proceedings. Accordingly, plaintiffs were held entitled to a trial against these defendants despite the plaintiffs' previous conviction for breach of the peace by a municipal police justice (not a court of general jurisdiction) because there were factual issues as to the probable cause for the restraint imposed on plaintiffs by the out-of-court act of arrest. Here respondent imposed no restraint on petitioner by arrest nor did it proceed by any *ex parte* action.

Here the issue is the reasonable basis for a judicial proceeding and not for a separate out-of-court act, and the appropriate analogy is to the law of malicious prosecution and not the law of false arrest. As all judges below agreed:

> "Since this case involved no ex parte restraint on [petitioner's] liberty we find the analogy to malicious prosecution far more compelling than any analogy to false arrest." (14A)

The judicial proceeding against petitioner was not a frivolous one. It involved the striking of a balance between the public's right to be protected against the unauthorized practice of law and the constitutional guarantees of the First Amendment. This Court has looked carefully at state programs regulating the practice of law that may impinge upon protected speech. In doing so, however, it has recognized "that the states have broad powers to regulate the practice of law." *UNW* v. *Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967); *accord Brotherhood of Railroad Trainmen* v. *Virginia*, 377 U.S. 1, 6 (1964); *see also Hackin* v. *Arizona*, 389 U.S. 143 (1967).

II. Petitioner's Claim Is Contrary to the Intent of the Civil Rights Act and the First Amendment

The purpose of the Civil Rights Act of 1871 was to discourage lawless conduct, not to inhibit the use of the courts with all the safeguards surrounding our judicial system. It was intended to provide a federal remedy to victims of lawlessness, political suppression or violence perpetrated outside the judicial process, especially those acts perpetrated by the Ku Klux Klan which were primarily responsible for the turmoil leading to the Act's passage. *See Monroe* v. *Pape,* 365 U.S. 167, 174 (1961). The Act was not intended to inhibit persons from presenting matters to a court for resolution or from arguing their cause before the court. All the bar association did here, and the only thing the bar association did here, was to initiate a judicial proceeding.

In this case the bar association obeyed the spirit of the Civil Rights Act and the specific mandate of state law in prosecuting Mr. Dacey in court. As petitioner he presents no reason why the bar association should be denied not only the absolute immunity from suit of a judicial officer but also the limited immunity for action based on probable cause extended to peace officers in suits for false arrest and private litigants in suits for malicious prosecution. If the First Amendment protects Mr. Dacey's right to practice law through publication, the same principles of free expression should, far from requiring that the bar association be stripped of all common law immunities and defenses, protect it in its resort to the courts.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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